No. 88-357-CFH
Status: GRANTED

Title: Norm Maleng, etc., et al., Petitioners
v.
Mark Edwin Cook

Docketed:
August 27, 1988

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Williams,William L.

Counsel for respondent: Midgley,John

Entry	Date	Note	Proceedings and Orders
1	Aug 27 1988	G	Petition for writ of certiorari filed.
3	Sep 20 1988		Order extending time to file response to petition until October 18, 1988.
5	Oct 18 1988	X	Brief of respondent Mark Edwin Cook in opposition filed.
6	Oct 18 1988	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Oct 19 1988		DISTRIBUTED. November 4, 1988
8	Oct 31 1988		REDISTRIBUTED. November 4, 1988
9	Nov 7 1988		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Nov 7 1988		Petition GRANTED.
			**********
12	Dec 21 1988		Order extending time to file brief of respondent on the merits until January 31, 1989.
13	Dec 21 1988		Joint appendix filed.
14	Dec 21 1988		Brief of petitioners Norm Maleng, etc., et al. filed.
15	Jan 9 1989		Record filed.
		*	Certified copy of original record and proceedings, 2 volumes, received.
16	Jan 9 1989	D	Motion of William L. Williams, Esquire, to permit John M. Jones, Esquire, to present oral argument pro hac vice filed.
17	Jan 17 1989		Motion of William L. Williams, Esquire, to permit John M. Jones, Esquire, to present oral argument pro hac vice DENIED.
19	Jan 30 1989		Brief amici curiae of ACLU, et al. filed.
18	Jan 31 1989		Brief of respondent Mark Edwin Cook filed.
22	Jan 31 1989		Brief amicus curiae of National Legal Aid and Defender Association filed.
20	Feb 3 1989		SET FOR ARGUMENT MONDAY, MARCH 27, 1989. (2ND CASE)
23	Feb 15 1989		CIRCULATED.
25	Mar 1 1989	X	Reply brief of petitioners Norm Maleng, etc., et al. filed.
26	Mar 27 1989		ARGUED.

(1)

88-357

No. _____

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1988

NORM MALENG, King County Prosecuting Attorney; AMOS E. REED, Secretary of the Washington State Department of Social & Health Services; KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does the District Court have subject matter jurisdiction over a § 2254 challenge to a conviction when the sentence involved has expired, but the conviction itself may have been used to enhance a subsequent unrelated state minimum term setting or in setting a subsequent federal prison term?

LIST OF PARTIES

The Petitioners, Norm Maleng, King County Prosecuting Attorney; Amos E. Reed, Secretary of the Washington State Department of Social and Health Services; and Kenneth O. Eikenberry, Attorney General, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on June 2, 1988.

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No. _____

IN THE

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The Petitioners, Norm Maleng, Amos E. Reed and Kenneth O. Eikenberry, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on June 2, 1988.

OPINIONS BELOW

The Opinion filed on June 2, 1988, by the United States Court of Appeals for the Ninth Circuit, reversing and remanding for further proceedings, appears in Appendix A. The Order of the United States District Court for

the Western District of Washington adopting the Magistrate's Report and Recommendation and dismissing Mr. Cook's petition for writ of habeas corpus for lack of subject matter jurisdiction appears in Appendix B. The Magistrate's Report and Recommendation appears in Appendix C.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on June 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Habeas Corpus statute regarding remedies in Federal courts for petitioners in State custody, 28 U.S.C. § 2254. (The above provision is set forth in Appendix D attached hereto.)

STATEMENT OF THE CASE

Respondent, Mark Edwin Cook, is currently serving a thirty year federal sentence for Bank Robbery and Conspiracy. In 1958, a jury in Washington State court convicted Mr. Cook of three counts of Robbery. He was sentenced to three concurrent twenty year terms of imprisonment and was thereafter paroled in 1962.

While on parole in 1965, Mr. Cook was again convicted in Washington State court of three counts of Robbery, and sentenced to three concurrent fifty year terms. He was then again paroled in 1973. In 1976, while on parole, Mr. Cook was convicted of the federal crimes leading to his current incarceration.

Mr. Cook was also convicted in Washington State court in 1976 of two counts of First Degree Assault and one count of Aiding a Prisoner to Escape. The Washington State court thereafter sentenced Mr. Cook to two life terms and one ten year term of imprisonment. These sentences were maximum terms in Washington's then indeterminate sentencing scheme, with the minimum term to be set by the Board of Prison Terms and Paroles. Since Mr. Cook had a prior felony conviction, his minimum term was required to be set two and one-half years longer than would otherwise be the case.[1] Because Mr. Cook could not serve that sentence until his release from federal prison, the State of Washington has placed a detainer against him requesting federal prison authorities to notify the State when Mr. Cook's federal term expires.

In 1985—twenty-seven years after his 1958 conviction and seven years after the expiration of his sentence thereon—Mr. Cook filed his present federal habeas petition, pursuant to 28 U.S.C. § 2254, challenging that 1958 conviction. He alleged that his 1958 conviction had been used illegally to enhance both his 1976 federal sentence and 1978 state sentences because he was never given a competency hearing in 1958. The District Court adopted the Magistrate's Report and Recommendation and granted the state's motion to dismiss the petition for lack of subject matter jurisdiction due to the expiration of the 1958 sentence. Mr. Cook then filed a timely notice of appeal and the circuit court issued a certificate of probable cause.

In examining Mr. Cook's petition, the circuit court found that the 1958 conviction might have lengthened his 1978 minimum term by as much as seven and one-half years.[2] This collateral consequence of the expired 1958 conviction upon the unserved 1978 minimum term led the circuit court to find that the district court did have subject matter jurisdiction to entertain Mr. Cook's petition be-

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[1] RCW 9.95.040(4) gives the Board the authority to waive Mr. Cook's mandatory minimum term and parole him prior to such term's expiration. RCW 9.95.040 is set forth in Appendix E.

[2] This is an incorrect statement of Washington Law. RCW 9.95.040 required Mr. Cook's minimum term to be set at five years due to his use of a deadly weapon in the course of committing the crimes for which he was sentenced in 1978. His prior felony conviction required this minimum term to be increased two and one-half years for a total of seven and one-half years. Mr. Cook would have been subject to this two and one-half year increase regardless of the 1958 conviction because of his 1965 felony convictions.

cause such a collateral consequence was enough to meet the in custody requirement of 28 U.S.C. § 2254(a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Ninth Circuit has adopted a rule that essentially means that state court convictions are never final.

This case presents the court with an important question of federal law that affects every state in the union and upon which the circuit courts have divided. At what point will a state be relieved from the obligation of defending a collateral attack on a criminal conviction where sentence has expired?

The Ninth Circuit's decision held that the district court had subject matter jurisdiction to entertain Mr. Cook's habeas challenge of his expired 1958 conviction. The court reasoned that since the 1958 conviction "might" increase Mr. Cook's minimum term on a subsequent state conviction, although not addressing whether it would increase his current federal term, he was "in custody" on the 1958 conviction for purposes of 28 U.S.C. § 2254 subject matter jurisdiction. Petitioners respectfully assert the district court was in fact without subject matter jurisdiction to hear Mr. Cook's collateral challenge to his expired 1958 conviction because he no longer was in custody on the challenged conviction when his petition was filed. Further, the possibility that the 1958 conviction might lengthen the minimum term of his subsequent state sentence or may have been considered in his subsequent federal sentencing are collateral consequences too attenuated and indirect for this court to find Mr. Cook "in custody" for purposes of 28 U.S.C. § 2254 subject matter jurisdiction.

The general nature of the habeas corpus writ from the time of its common law origin was to provide a remedy for the unlawful imprisonment of an individual. *Fay v. Noia*, 372 U.S. 391 (1963). As a direct result, the statutes governing federal habeas corpus and the rules that were enacted to enforce that procedure were consistently drafted to re-

quire that the individual seeking relief by way of a habeas corpus petition be a person "in custody". *See*, 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254(a)(b)(d); § 2254, Rule 1(a)(1-2); § 2254, Rule 2(a) and (b).

It is apparent from the early cases that the "in custody" requirement for habeas corpus was originally construed to mean actual confinement or the present means of enforcing confinement. *Wales v. Whitney*, 114 U.S. 564 (1885).

More recently, the courts have taken a somewhat more liberal view of the degree of restraint on personal liberty that is necessary to satisfy the "in custody" requirement of § 2254. As a result, a prisoner placed on conditional parole has been held to be "in custody" within the meaning of 28 U.S.C. § 2241(c). *Jones v. Cunningham*, 371 U.S. 236 (1963).

The *Jones* court went on to hold "* * * English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement." *Id.* at 238. The court stated further:

> * * * history, usage, and precedent can leave no doubt that besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English speaking world to support the issuance of habeas corpus.

Id. at 240

With the above case as authority, the concept of custody for purposes of habeas corpus has been expanded considerably. The writ has been made available to individuals who have been placed on probation, *Benson v. California*, 328 F.2d 159 (9th Cir. 1964), *cert. den.* 380 U.S. 951 (1965), or released on their own recognizance, *Hensley v. Municipal Court*, 411 U.S. 345 (1973).

Finally, in *Carafas v. LaVallee*, this Court held that if a petitioner is in custody at the time that his application for habeas corpus relief is filed, federal jurisdiction is not defeated by his unconditional and immediate release from incarceration, if his release occurs prior to completion of

the proceedings on the habeas corpus petition. *Carafas v. LaVallee*, 391 U.S. 234 (1968).

These cases follow a common line of reasoning. The habeas petitioner is under some meaningful restraint stemming directly from the conviction the petitioner is now attacking at the time the petition is filed. This reasoning cannot be applied to the case at bar where the petitioner challenges a conviction twenty-seven years and three sets of felony convictions after trial, as well as seven years after the sentence thereon has expired.

Petitioner does not allege that his 1965, 1976 or 1978 felony convictions were unlawful, only that there possibly was an enhancement of his 1976 and 1978 sentences, stemming from convictions in no way related to his 1958 conviction. Thus, Mr. Cook's situation is different from the case of an offender in a habitual criminal trial where the prior conviction itself may be an actual element of the subsequent criminal charge. Such a direct consequence is absent in the case at bar.

However, several circuits have dealt with petitions where the petitioner was no longer under direct restraint stemming from the conviction now under attack, but was still being affected by some collateral consequence of that conviction, and found subject matter jurisdiction to be lacking.

In *Cotton v. Mabry*, 674 F.2d 701 (8th Cir. 1982), *cert. denied*, 459 U.S. 1015 (1982), the Eighth Circuit addressed the issue of the dismissal, for lack of subject matter jurisdiction, of a habeas petition because the petitioner had served his sentence prior to filing his petition and thus was no longer in custody. The district court found, and the circuit court held, that even though the conviction may have prolonged a subsequent unrelated state sentence, the petitioner was not "in custody" as required by 28 U.S.C. § 2254.

In the case at bar, the district court relied upon *Harris v. Ingram*, 683 F.2d 97 (4th Cir. 1982) where the Fourth Circuit examined the dismissal of a habeas petition attacking a state conviction filed after his unconditional

release from sentence. Again, the district court found, and the circuit court held, that even though the conviction may have enhanced petitioner's subsequent federal sentence, he was not "in custody" on that prior conviction, thus the jurisdictional requirement of 28 U.S.C. § 2254 was not met.

The Sixth Circuit, in deciding a case almost identical to the case at bar and upon which the district court also relied in dismissing Mr. Cook's petition, examined the jurisdictional "in custody" requirement of 28 U.S.C. § 2254 in *Ward v. Knoblock*, 738 F.2d 134 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985). The circuit court upheld the district court's dismissal of the petition because he was no longer in custody, as required by 28 U.S.C. § 2254, on the conviction's sentence, even though the conviction under attack may affect his parole eligibility on his present unrelated federal sentence and he is subject to future state custody stemming from an unrelated state detainer.

Other circuits have viewed the in custody jurisdiction requirement in a more liberal fashion. *See, Jackson v. State of Louisiana*, 452 F.2d 451 (5th Cir. 1971); *Aziz v. LeFeure*, 830 F.2d 184 (11th Cir. 1987); *Lyons v. Brierly*, 435 F.2d 1214 (3rd Cir. 1970); and *United States v. LaVelle*, 330 F.2d 303 (2nd Cir. 1964).

2. **The rule established by the Court of Appeals provides a disincentive to the states to establish a structured means of arriving at a just and equitable sentence utilizing prior criminal convictions.**

The liberal view of the "in custody" requirement, as adopted by the Ninth Circuit, serves as a disincentive to states to adopt structured sentencing schemes. Washington has adopted, as have other states and the federal government, a system of sentencing that requires the court to look to objective factors in arriving at a sentence for a given offender.[3] Such schemes virtually all look to past criminal convictions as one of the factors to be considered

[3] *See*, Chapter 9.94A, Revised Code of Washington, 9.94A.310 - 9.94A.370.

in arriving at a just and equitable sentence.[4] The alternative to such schemes is to leave sentencing to the unfettered discretion of the sentencing court.

Without some point where a criminal judgment will be considered final, the states will never be relieved of the burden of defending prior convictions if used in subsequent sentencings. Such a policy would be a disincentive to the states to structure and objectify their criminal sentencing schemes. Both the defendant and the public are better served by a sentencing system that limits discretion by directing the court to base a criminal sentence on objective factors, set out in advance.

3. **The Court of Appeals' decision in the case at bar provides career criminals with an incentive to attack their early criminal convictions with false allegations at a time when the state may be unable to refute such allegations because of the unavailability of records and testimony of officials and participants in the trial.**

Although addressing a different factual aspect of the "in custody" requirement in federal habeas proceedings, this Court made several observations in *Peyton v. Rowe*, 391 U.S. 54 (1968), that are relevant to the case at bar.

In holding that a state prisoner was in custody to attack the legality of a consecutive sentence prior to commencement of said sentence, the *Peyton* Court explained the dangers of waiting twenty years before litigating matters involving factual issues. The lengthy period of time involved prior to litigating factual issues leads to "dimmed memories or the death of witnesses [that] is bound to render it difficult or impossible to secure crucial testimony on

[4] *See*, California Penal Code § 1170; Delaware Code Annotated Title 11, Chapter 42; District of Columbia Court Rules 32; Florida Statutes Annotated, Chapter 921; Annotated Code of Maryland, Rule 4-342, 4-343; Annotated Laws of Massachusetts § 279; Michigan Statutes Annotated § 28; Minnesota Statutes Annotated § 244 App.; Purdon's Pennsylvania Forms § 42; General Laws of Rhode Island § 12-19; Utah Code Annotated § 77; Vermont Revised Criminal Procedure 32; Wisconsin Statutes Annotated, Chapter 973.

disputed issues of fact." *Id.*, at 62. The *Peyton* Court went on to state that "postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice." *Id.* (Footnote omitted).

The *Peyton* Court was mindful of and quoted from the circuit court's analysis of the case below. The circuit court had observed:

> Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the Commonwealth of Virginia may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary.
>
> It is to the great interest of the Commonwealth and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established.

Id., at 62-63 (citation omitted).

In the case at bar, Mr. Cook filed his petition challenging his 1958 conviction twenty-seven years after being sentenced. The circumstances are just as predicted by the *Peyton* Court. Mr. Cook has made factual allegations and is willing to give testimonial support to these allegations. The state is unable to locate the complete state court records or the doctors involved. None of the attorneys for the prosecution or the defense have any recollection of a competency issue at Mr. Cook's 1958 trial. CR 10, at Affidavit of Michael P. Lynch. Thus, the state will be extremely prejudiced in its efforts to answer Mr. Cook's allegation.

The rule adopted by the Ninth Circuit enables an offender, who has embarked on a criminal career spanning more than thirty years, to now go back and challenge his early convictions in hopes of lessening his period of confinement on one or more subsequent, unrelated convictions. The State submits that such is not "substantial justice." Neither the history of the Great Writ or this Court's prior decisions stand for such an abuse where, as

here, the offender had two decades to present this issue to a federal court while still in custody.

CONCLUSION

It is up to this Court to resolve this important question of federal law that has caused confusion and division in the various circuits which have addressed the issue. There must be a point beyond which finality of judgments will over-ride attenuated, collateral effects of those judgments. For the above stated reasons, petitioners pray that this Court grant certiorari and establish that point.

DATED this _____ day of _____, 1988.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-4151

D.C. No.
C85-1943D

OPINION

MARK EDWIN COOK,
Petitioner-Appellant,

v.

NORM MALENG, KING COUNTY PROSECUTING ATTORNEY; AMOS E. REED, SECRETARY OF THE WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES; KENNETH O. EIKENBERRY, ATTORNEY GENERAL,
Respondents-Appellees.

Appeal from the District Court
Western District of Washington
CAROLYN DIMMICK, District Judge, Presiding

Argued and Submitted
March 8, 1988—Seattle, Washington

Filed June 2, 1988

Before: THOMAS TANG and WILLIAM C. CANBY, JR., Circuit Judges, and JESSE W. CURTIS,* District Judge.

Per Curiam

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* The Honorable Jesse W. Curtis, Senior United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Criminal Sentencing/Habeas Corpus

Appeal from denial of habeas corpus. The court reversed and remanded holding that the custody requirement for habeas corpus relief is satisfied where a prisoner's prior conviction, although expired, is used to enhance the sentence on a current or future term.

In 1958 and in 1965, a Washington state jury convicted appellant Cook of armed robbery. In 1976, while on parole, Cook was again convicted of bank robbery and conspiracy and is currently serving a 30-year federal sentence. Cook also was convicted in Washington state in 1976 for assault and aiding a prisoner to escape. In 1978, the state sentenced Cook to two life terms and one ten-year term; his sentence was lengthened because of his prior convictions. Cook filed this habeas petition in 1985, alleging that his 1958 conviction had been used illegally to enhance both the 1976 federal and 1978 state sentences. The district court granted the state's motion to dismiss the petition.

[1] This circuit has not previously decided whether satisfaction of the custody requirements to allow an attack on a current sentence ,necessarily satisfies the custody requirements to allow an attack on an earlier conviction used to enhance the sentence for the later conviction. A prisoner "in custody" under one conviction is "in custody" to attack an earlier conviction used to enhance the sentence for the later conviction. **[2]** Here, Cook is under a detainer because of a state conviction which was lengthened because of his 1958 conviction; Cook is thus meaningfully restrained by the 1958 conviction. **[3]** Because Cook's 1958 conviction lengthened his 1978 sentence, Cook is "in custody" for the purposes of a habeas corpus attack on the 1958 conviction, and the district court erred in dismissing Cook's petition for want of subject matter jurisdiction.

COUNSEL

John Midgley, Smith, Midgley & Pumplin, Seattle, Washington for the petitioner-appellant.

Charles S. Faddis, Assistant Attorney General, Olympia, Washington, for the respondents-appellees.

OPINION

PER CŪRIAM:

Mark Edwin Cook, a federal prisoner, appeals pro se the dismissal for lack of subject matter jurisdiction of his 28 U.S.C. § 2254 habeas petition. Cook alleges that the district court erred in finding that he was not sufficiently "in custody" to confer subject matter jurisdiction over his challenge to a 1958 state conviction. We agree.

BACKGROUND

Cook is currently serving a 30-year federal sentence for bank robbery and conspiracy. In 1958, a jury in Washington state court convicted Cook of three counts of armed robbery; the state sentenced Cook to three concurrent 20-year terms of imprisonment and paroled him in 1962.

While on parole in 1965, Cook was convicted in Washington state court of three counts of robbery, and sentenced to three concurrent 50-year terms; he was paroled from this sentence in 1973. In 1976, while on parole, Cook was convicted of the federal crimes leading to his current incarceration.

Cook was also convicted in Washington state court in 1976 of two counts of first-degree assault and one count of aiding a prisoner to escape. In 1978, the state sentenced Cook to two life terms and one ten-year term of imprisonment; Cook's sentence was lengthened by two and one-half years because of his prior convictions. Because Cook could not serve that sentence until his release from federal incarceration, the Washington Department of Prisons placed a detainer on him, requesting the federal prison to notify the state when Cook's federal term expires.

Cook filed this habeas petition in 1985, alleging that his 1958 conviction had been used illegally to enhance both

the 1976 federal and 1978 state sentences.[1] The district court granted the state's motion to dismiss the petition. Cook timely filed a notice of appeal, and this court issued a certificate of probable cause.

ANALYSIS

This court reviews de novo the district court's dismissal for lack of subject matter jurisdiction. *See Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 768 (9th Cir. 1986).

The district court has jurisdiction over habeas petitions under 28 U.S.C. § 2241, which provides, in part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless. * * * (3) He is *in custody* in violation of the Constitution or laws or treaties of the United States* * *

28 U.S.C. § 2241(c) (emphasis added); *see also* 28 U.S.C. § 2254(c). Cook contends that the district court had jurisdiction to adjudicate his challenge to his 1958 conviction because that conviction was used to enhance the sentences for the 1976 federal and state convictions. The state argues that Cook was not "in custody" for the purpose of attacking the 1958 conviction when he filed his federal habeas petition in 1985 because the 20-year sentence for Cook's 1958 conviction had expired in 1978.

When he filed this federal habeas petition in 1985, Cook was under a state detainer to serve his 1978 state sentence. The district court clearly had subject matter jurisdiction over Cook's attack on his 1978 sentence and the state concedes this point. *Rose v. Morris*, 619 F.2d 42, 43 (9th Cir. 1980); *Peyton v. Rowe*, 391 U.S. 54, 67 (1968) ("[A] prisoner serving consecutive sentences is 'in custody' under any one of them* * *").

[1] This circuit has not previously decided whether satisfaction of the custody requirements to allow an attack on a current sentence necessarily satisfies the custody requirements to allow an attack on an earlier conviction used

[1] Cook challenges the 1958 conviction on the ground that he was never given a competency hearing, even though the trial judge found that there was reasonable doubt as to Cook's competence to stand trial. The merits of that claim are not at issue in this appeal.

to enhance the sentence for the later conviction. We agree with the reasoning of those courts that have held that a prisoner "in custody" under one conviction is "in custody" to attack an earlier conviction used to enhance the sentence for the later conviction. *See, e.g., Anderson v. Smith*, 751 F.2d 96, 100 (2d Cir. 1984) (where a prior conviction "may lengthen [the prisoner's] time in prison, he is "in custody" pursuant to that conviction for the purposes of habeas corpus jurisdiction"); *Harrison v. Indiana*, 597 F.2d 115, 116-117 (7th Cir. 1979) (jurisdiction to hear attack on a conviction if its invalidation would shorten current incarceration); *Lyons v. Brierly*, 435 F.2d 1214, 1215-1216 (3d Cir. 1970) (habeas jurisdiction over attack on prior conviction); *Capetta v. Wainwright*, 406 F.2d 1238, 1239 (5th Cir.) (jurisdiction over attack on first conviction if current sentence reduced by invalidation), *cert. denied*, 396 U.S. 846 (1969); *cf. Ward v. Knoblock*, 738 F.2d 134, 139 (6th Cir. 1984) (a prisoner is "in custody" to attack an illegally enhanced impending federal sentence in a 28 U.S.C. § 2255 proceeding), *cert. denied*, 469 U.S. 1193 (1985).

[2] The magistrate, whose recommendation forms the basis of the district court's decision, relied on *Harris v. Ingram*, 683 F.2d 97, 98 (4th Cir. 1982), a case distinguishable from the instant appeal. *Harris* involved an attack *only* on a federal sentence which was dismissed because it should have been brought in a 28 U.S.C. § 2255 proceeding. Moreover, the district court's reliance on *Ward v, Knoblock*, 738 F.2d 134 (6th Cir. 1984) *cert. denied*, 469 U.S. 1193, is also misplaced. In *Ward*, the court held that a prisoner is not "in custody" to attack a conviction where that conviction has been fully served and no longer places any "meaningful" restraint on the prisoner. *Ward*, 738 F.2d at 138. The court went on to conclude, however, that a prisoner is in custody to attack the legality of a sentence *not yet served* because a pending incarceration is a meaningful restraint. *Ward*, 738 F.2d at 139. Here, Cook is under a detainer because of a state conviction which was

lengthened because of his 1958 conviction; Cook is thus meaningfully restrained by the 1958 conviction.

[3] In this case the state used Cook's 1958 conviction to enhance his 1978 sentence. *See* Wash. Rev. Code §§ 9.95.040 (1988), 9.41.025 (repealed 1984)(enhancement statutes); *see also*, Wash. rev. Code § 10.01.040 (1980 & Supp. 1988) (general criminal penalty "savings" statute). Cook is challenging the use of the 1958 conviction to enhance that sentence. If the 1958 conviction is invalid, it should not have been used to enhance the 1978 sentence. *See State v. Gonzales*, 103 Wash. 2d 564, 567, 693 P.2d 119, 121 (1985) (state must prove validity or prison conviction used to enhance sentence); *State v. Barnes*, 42 Wash. App. 56, 57, 708 P.2d 414, 415 (1985). If the enhancement of the 1978 sentence is invalid, the length of Cook's impending state imprisonment might be reduced by as much as seven and one-half years. *See* Wash. Rev. Code §§ 9.95.040(2), 9.41.025. Therefore, because Cook's 1958 conviction lengthened his 1978 sentence, Cook is "in custody" for the purposes of a habeas corpus attack on the 1958 conviction, and the district court erred in dismissing Cook's petition for want of subject matter jurisdiction. *See* 28 U.S.C. § 2241(c)(3), 2254(b); *Anderson*, 751 F.2d at 100.[2]

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[2] The state argues that the enhancement argument goes to the issue of "mootness" rather than the "in custody" requirement. *See Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). Those cases which treat the problem of "collateral consequences" as a mootness issue do not involve sentence enhancement, but instead the civil or other ramifications of a conviction and sentence where the prisoner *has been released from state custody*. *See e.g., Lane v. Williams*, 455 U.S. 624, 630-631 (1982); *Aaron v. Pepperas*, 790 F.2d 1360, 1361 (9th Cir. 1986). The 1958 conviction was used to increase the length of a term of imprisonment Cook *has yet to serve*, such a "collateral consequence" establishes the district court's subject matter jurisdiction over a challenge to the 1958 conviction.

This proposition also finds support in this court's recent decision in *Myers v. Parole Commission*, 813 F.2d 957 (9th Cir. 1987). In *Myers*, this court noted, in dicta, that "[w]e have also held that the collateral consequences of a conviction may in some cases be sufficient to satisfy the "in custody" requirement even though the habeas petitioner is not in custody for the conviction he seeks to challenge when he files the habeas petition." *Myers*, 813 F.2d at 959; *see Braun v. Rhay*, 416 F.2d 1055, 1059 (9th Cir. 1969); *Arketa v. Wilson*, 373 F.2d 582, 584-85 (9th Cir. 1967) The State in *Myers* made an argument almost identical to the state's argument here. *See* Case file in No. 85-6264, Appellee's Brief at 4-6.

We do not hold that jurisdiction afforded by section 2254(a) extends to all constitutional challenges to prior convictions upon a showing of some unfavorable collateral consequence flowing from the challenged conviction. The question presented for our decision is a narrow one, namely, whether the custody requirement for habeas corpus relief is satisfied where a prisoner's prior conviction, although expired, is used to enhance the sentence on a current or future term. We conclude the custody requirement is satisfied in such a case. Where the state uses a prior conviction to enhance a present or future sentence, fairness requires that such restraints on individual liberty be justified. *See Hansley v. Municipal Court*, 411 U.S. 345, 350-51 (1973).

The judgment is REVERSED and the case is REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C85-1943D

ORDER

MARK EDWIN COOK,

Petitioner,

v.

NORM MALENG, et al.,

Respondents.

THE COURT has considered Mark Edwin Cook's petition for writ of habeas corpus and respondent Washington State's motion for dismissal, together with the memoranda submitted by the parties. The Court has also considered the Report and Recommendation of United States Magistrate Philip K. Sweigert and Cook's memorandum filed in opposition to the Report and Recommendation.

The Court approves and adopts the Report and Recommendation. The Court rejects Cook's argument made in opposition to the Report and Recommendation that his 1958 sentence did not expire in 1978. There is nothing in the record which shows that his parole of the 1958 sentence was ever revoked. Thus, that sentence expired in 1978.

THEREFORE, Cook's petition for a writ of habeas corpus is DENIED for lack of subject matter jurisdiction under 28 U.S.C. §2254(a).

The Clerk of the Court is instructed to send a copy of this Order to petitioner, to counsel of record for respondents, and to the above-named Magistrate.

DATED this 19th day of May, 1986.

CAROLYN R. DIMMICK
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C85-1943D

REPORT AND RECOMMENDATION

MARK EDWIN COOK,

Petitioner,

v.

NORM MALENG, et al.,

Respondents.

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner, currently incarcerated at the federal penitentiary in Lompoc, California, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 challenging a 1958 Washington State robbery conviction. Respondents move to dismiss on the ground that petitioner is not "in custody," or in the alternative, that his petition is barred by laches. For the following reasons, I conclude that petitioner is not in custody under §2254(a) and the petition should be denied.

DISCUSSION

Petitioner challenges his 1958 conviction on the ground that he was denied due process when the state allegedly failed to hold a competency hearing. That sentence expired in 1978.

The federal habeas corpus statute, 28 U.S.C. §2254(a), limits the availability of the writ to those persons "in custody pursuant to the judgment of a state court * * *." See also id. §2541(c)(3). Both the statutory authority granted by Congress and the history of habeas corpus require a habeas petitioner to be in custody at the time the petition

is filed. *Carafas v. LaValle*, 391 U.S. 234 (1968); *Tyars v. Finner*, 709 F. 2d 1274, 1279 (9th Cir. 1983).

Petitioner attempts to meet the custody requirement by alleging that his 1958 conviction has been used to enhance his federal sentence currently being served as well as a state sentence for a 1978 conviction which he has yet to serve. Although the scope of the custody requirement has been expanded to include situations falling short of actual, present confinement,[1] no court has gone so far as to bring within the jurisdiction of the writ a petitioner who has fully served the sentence under attack.

Petitioner's arguments regarding the adverse effects of his 1958 conviction go to the issue of mootness, and not to the Court's jurisdiction under §2254(a). In similar situations it has been held that a petitioner who challenged an expired state conviction while in federal custody did not meet the jurisdictional "in custody" requirement of §2254(a). *Ward v. Knoblock*, 738 F. 2d 134, 138-139 (6th Cir. 1984); *Harris v. Ingram*, 683 F. 2d 97, 98 (4th Cir. 1982).

In *Ward*, the Court rejected the argument, as raised by petitioner in the instant case, that the "in custody" language permits prisoners to challenge past confinement:

> "The existence of collateral consequences of [a] conviction may enable a petitioner who has fully served a sentence he wished to challenge to avoid being dismissed on mootness grounds, but it will not suffice to satisfy the 'in custody' jurisdictional prerequisite unless, as in *Carafas* itself, federal jurisdiction has already attached."

Id. 738 F. 2d at 138-139.

Although petitioner is correct in that he has met the "in custody" requirement regarding his 1978 Washington State conviction which he will serve following his release from federal custody, his habeas petition challenges only his 1958 conviction. Even under the most liberal reading of

[1] See *Carafas v. LaValle*, 391 U.S. 234 (1968) (release after filing habeas petition); *Peyton v. Rowe*, 391 U.S. 54 (1968) (future sentence not yet being served); *Jones v. Cunningham*, 371 U.S. 236 (1963) (release on parole).

the "in custody" requirement, it is clear that the petition must be denied because petitioner's sentence expired before he filed this petition.

CONCLUSION

I recommend that the petition for writ of habeas corpus be denied for lack of subject matter jurisdiction under 28 U.S.C. §2254(a).

A proposed form of Order is attached.

DATED this 24th day of March, 1986.

PHILIP K. SWEIGERT
United States Magistrate

APPENDIX D

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; or

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall pro-

duce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.

APPENDIX E

9.95.040 Board to fix duration of confinement—Minimum terms prescribed for certain cases. The board shall fix the duration of confinement for persons committed by the court before July 1, 1986, for crimes committed before July 1, 1984. Within six months after the admission of the convicted person to the penitentiary, reformatory, or such other state penal institution as may hereafter be established, the board shall fix the duration of his confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense of which he was convicted or the maximum fixed by the court where the law does not provide for a maximum term.

The following limitations are placed on the board or the court for persons committed to prison on or after July 1, 1986, for crimes committed before July 1, 1984, with regard to fixing the duration of confinement in certain cases, notwithstanding any provisions of law specifying a lesser sentence:

(1) For a person not previously convicted of a felony but armed with a deadly weapon at the time of the commission of his offense, the duration of confinement shall not be fixed at less than five years.

(2) For a person previously convicted of a felony either in this state or elsewhere and who was armed with a deadly weapon at the time of the commission of his offense, the duration of confinement shall not be fixed at less than seven and one-half years.

The words "deadly weapon," as used in this section include, but are not limited to, any instrument known as a blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

(3) For a person convicted of being an habitual criminal within the meaning of the statute which provides for man-

datory life imprisonment for such habitual criminals, the duration of confinement shall not be fixed at less than fifteen years. The board shall retain jurisdiction over such convicted person throughout his natural life unless the governor by appropriate executive action orders otherwise.

(4) Any person convicted of embezzling funds from any institution of public deposit of which he was an officer or stockholder, the duration of confinement shall be fixed at not less than five years.

Except when an inmate of the reformatory, penitentiary, or such other penal institution as may hereafter be established has been convicted of murder in the first or second degree, the board may parole an inmate prior to the expiration of a mandatory minimum term, provided such inmate has demonstrated a meritorious effort in rehabilitation and at least two-thirds of the board members concur in such action: *Provided*, That any inmate who has a mandatory minimum term and is paroled prior to the expiration of such term according to the provisions of this chapter shall not receive a conditional release from supervision while on parole until after the mandatory minimum term has expired.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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No. 88-357

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

NORM MALENG, KING COUNTY PROSECUTING ATTORNEY; AMOS E. REED, Secretary of the Washington State Department of Social & Health Services; KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

John Midgley
SMITH, MIDGLEY & PUMPLIN, P.S.
2200 Smith Tower
Seattle, WA 98104
(206) 682-1948

Counsel of Record For
Respondent

COUNTERSTATEMENT OF QUESTION PRESENTED

Does the District Court have subject matter jurisdiction over a §2254 challenge to a prior state conviction on which the sentence has been served, when the state continues to use the prior conviction to directly enhance a present or future state prison term pursuant to state statutes mandating a longer prison sentence because of the prior conviction?[1]

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1. The issue is restated in this way because Respondent disputes the use of the words "may" and "unrelated" in the Statement of Question Presented in the Petition. See the Counterstatement of Facts, and Argument, below.

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Table of Authorities

CASES

STATUTES

The Respondent, Mark Edwin Cook, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 847 F.2d 616.

COUNTERSTATEMENT OF THE CASE

The petitioner's statement of the case is incorrect in one crucial respect. Mr. Cook's 1958 Washington conviction has directly enhanced his 1978 Washington sentence.[1] The state, in suggesting there is no real enhancement, conveniently ignores one of the two applicable Washington enhancement statutes cited by the Ninth Circuit. That statute, former RCW 9.41.025, mandatorily lengthens by seven and one half years the time Mr. Cook must serve under his 1978 state sentence as a result of the 1958 conviction at issue here.[2]

Former RCW 9.41.025 requires that a defendant who is convicted of using a firearm in the commission of a felony, and who has no prior felony convictions, serve a mandatory minimum duration of confinement of five years. This statute further mandates that upon a finding that the defendant has been convicted of one (1) prior felony, said mandatory five-year confinement is to be lengthened by two-and-one-half years to seven-and-one-half years, and that upon a finding that a defendant has been convicted of two (2) or more prior felony convictions, said mandatory confinement is to total fifteen

1. There is some unclarity in the Petition regarding Mr. Cook's most recent state conviction, his third state felony conviction. Mr. Cook was convicted in 1978 of both federal and state charges. The judgment and sentence on the state charges for assault and aiding a prisoner to escape was actually entered in 1978, and is referred to herein as the "1978 conviction", or "1978 sentence". Mr. Cook is currently in federal prison on his 1976 federal conviction; the 1978 state conviction at issue in this case will be served consecutively.

2. The state discusses only RCW 9.95.040. Petition at 3, footnote 2.

years. A copy of former RCW 9.41.025 is attached as Appendix A.[3] Mr. Cook's mandatory term is thus directly lengthened by his second prior conviction, the 1958 conviction at issue here.[4]

There is also another statutory enhancement of Mr. Cook's new state prison sentence resulting directly from the 1958 conviction, which was not cited by the Ninth Circuit. This enhancement occurs through the application of the Sentencing Grid the new Washington Sentencing Reform Act (SRA) to Mr. Cook's prison term. That Sentencing Grid is applicable to Mr. Cook's sentence though the operation of RCW 9.95.009(2),[5] and requires increasing Mr. Cook's presumptive time in custody based directly on the number of prior felony convictions proven.

The 1958 conviction increases Mr. Cook's presumptive sentence on his 1978 conviction by several years. Mr. Cook's 1958 conviction, a prior robbery, increases his total Offender

3. Although former RCW 9.41.025 has been repealed, it clearly still applies to Mr. Cook's case through Washington's criminal penalty "savings" statute, RCW 10.01.040.

4. The 1976 federal conviction would not serve as a second "previous" conviction because the behavior which led to that conviction was contemporaneous with the 1976 behavior leading to the 1978 state sentence. Convictions for contemporaneous behavior cannot be used to enhance each other. State v. Braithwaite, 92 Wn.2d 624, 628-629, 600 P.2d 1260, 1262-1263 (1979).

5. Although Mr. Cook was sentenced under the former sentencing law, RCW 9.95.009(2) mandates that the SRA provisions be considered with regard to old-law prisoners and defendants. Addleman v. Board of Prison Terms and Paroles, 107 Wn.2d 503, 730 P.2d 1327 (1986). RCW 9.95.009(2) is reproduced in Appendix B. The SRA provisions would have an enhancing effect on Mr. Cook's sentence due to the 1958 conviction even if RCW 9.95.040 or former RCW 9.41.025, discussed above, did not enhance based on the 1958 conviction. Addleman holds that, even though the SRA is not technically fully retroactive, the SRA standard range is the presumptive sentence, from which departure is allowed only on adequate written reasons. One such reason is "statutory preclusion," Addleman, 107 Wn.2d at 511, 730 P.2d at 1332, which means that mandatory prison terms required by RCW 9.95.040 and 9.41.025 take precedence if they are longer than the SRA presumptive term. In re Hunter, 106 Wn.2d 495, 723 P.2d 431 (1986). If such mandatory terms are shorter than the SRA presumptive range, or if there were no other mandatory terms under prior law, then the SRA range would constitute the presumptive prison term.

Score by "2" points and thereby increases his Standard Sentencing Range from a lower range of eight years, four months and an upper range of 11 years, one month ("midpoint" nine years, nine months) with an Offender Score of "5", to a lower range of 11 years and seven months and an upper range of 15 years, five months ("midpoint" 13 years, six months) with an Offender Score of "7".[6] Thus, the 1958 conviction increases the lower range by three years, three months, the upper range by four years, four months, and the "midpoint" by three years, nine months.

The suggestion throughout the petition that the sentence enhancement from the 1958 conviction is only "collateral" or theoretical is thus incorrect, both as a matter of fact and as a matter of Washington law.

REASONS WHY THE PETITION SHOULD BE DENIED

I. AS A MATTER OF WASHINGTON STATE LAW, RESPONDENT'S 1978 PRISON TERM IS NECESSARILY ENHANCED BY HIS 1958 PRIOR CONVICTION. THE NINTH CIRCUIT'S CONCLUSION THAT RESPONDENT THEREFORE CAN QUESTION THE CONSTITUTIONALITY OF THE 1958 CONVICTION IN HABEAS CORPUS IS CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS WHICH HAVE FACED THE SAME QUESTION.

The State's petition seriously distorts the findings on which the Ninth Circuit relied to make its decision. The State claims that the Ninth Circuit "reasoned that since [Mr. Cook's expired] 1958 conviction 'might' increase Mr. Cook's minimum term

6. The Sentencing Grid of the SRA provides Standard Sentencing Ranges for defendants and prisoners based on the seriousness level of the current offense cross-referenced with the total number and the nature of additional current offenses and prior offenses. RCW 9.94.310 and RCW 9.94.320. The seriousness level is determined by the most serious offense, Assault I in this case. RCW 9.94A.400(3). Mr. Cook's Offender Score totals "7" points as he is given "3" points for his second current assault offense, and "2" points each for each set of prior robbery convictions, the 1958 set and the 1965 set. RCW 9.94A.310 and RCW 9.94A.330. Cross-referencing the offense seriousness level, "XI" for Assault I, with his Offender Score "7" on the Sentencing Grid results in a Standard Sentencing Range for Mr. Cook of a lower range of 11 years, seven months and an upper range of 15 years, five months (with a "midpoint" of 13 years, six months). RCW 9.94A.310 and RCW 9.94A.370. See the excerpts from relevant statutes attached as Appendix C.

on a subsequent state sentence. . . he is 'in custody' on the 1958 conviction for purposes of 28 U.S.C. §2254 subject matter jurisdiction." Petition at 4. But the Ninth Circuit found instead that the 1958 conviction does directly enhance Mr. Cook's 1978 state sentence by operation of specific statutes:

> In this case the State used Cook's 1958 conviction to enhance his 1978 sentence. See Wash. Rev. Code §§9.95.040 (1988), 9.41.025 (repealed 1984) (enhancement statutes); see also, Wash. Rev. Code §10.01.040 (1980 & Supp. 1988) (general criminal penalty "savings" statute). Cook is challenging the use of the 1958 conviction to enhance that sentence. If the 1958 conviction is invalid, it should not have been used to enhance the 1978 sentence. See State v. Gonzales, 103 Wn.2d 564, 567, 693 P.2d 119, 121 (1985) (State must prove validity of prison conviction used to enhance sentence); State v. Barnes, 42 Wash. App. 56, 57, 708 P.2d 414, 145 (1985). If the enhancement of the 1978 sentence is invalid, the length of Cook's impending state imprisonment might be reduced by as much as seven and one-half years. See Wash. Rev. Code §§9.95.040(2), 9.41.025. Therefore, because Cook's 1958 conviction lengthened his 1978 sentence, the district court erred in dismissing Cook's petition for want of subject matter jurisdiction.

Cook v. Maleng, 847 F.2d 616, 618-619 (9th Cir. 1988). Moreover, as is shown above in the Counterstatement of the Case, the Court of Appeals was correct as a matter of fact and as a matter of Washington law that the 1958 conviction does work a direct enhancement on the newer state sentence.[7]

Significantly, it would have been inconsistent with Washington law to hold that Mr. Cook cannot challenge his 1958 state conviction when it was used to directly enhance his 1978 state conviction. The State Supreme Court in the present case ruled in 1984 on the merits of Mr. Cook's state post-conviction petition challenging the 1958 conviction. Washington law requires that the State prove the constitutional validity of

7. The fact that Mr. Cook's state sentence has not yet commenced is of no consequence. Mr. Cook is currently in federal prison, and his new state sentence will commence upon his release. There is no longer any question that Mr. Cook's future state incarceration is "custody" under the habeas statute. Peyton v. Rowe, 391 U.S. 54, 20 L.Ed.2d 426, 88 S.Ct. 1549 (1968). The State in this case appropriately does not appear to view the future nature of the state custody as an issue.

prior convictions used to enhance sentence. State v. Holsworth, 93 Wn.2d 148, 607 P.2d 845 (1980). Washington law also clearly permits a later collateral challenge to prior convictions underlying an enhanced sentence. In re Haws, 99 Wn.2d 80, 660 P.2d 263 (1983), overruling In re Lee, 95 Wn.2d 357, 623 P.2d 687 (1980). Moreover, under the new Sentencing Reform Act, applicable in part to Mr. Cook's sentence as shown in the Counterstatement of the Case, the only method of attacking a facially valid prior conviction is through a state post-conviction petition, and then a motion for resentencing after a successful collateral attack. State v. Ammons, 105 Wn.2d 175, 187-188, 713 P.2d 719, 726-727 (1986). The state courts thus claim no interest in preventing collateral attacks on old convictions used to enhance new sentences; on the contrary, the thrust of Washington law is to encourage post-conviction petitions of exactly the kind Mr. Cook presented here.

Moreover, the Ninth Circuit's decision was carefully tailored to find "custody" only where direct enhancement from an expired conviction is present. The actual holding of the Ninth Circuit was explicitly narrow:

> We do not hold that jurisdiction afforded by §2254(a) extends to all constitutional challenges to prior convictions upon a showing of some unfavorable collateral consequence flowing from the challenged conviction. The question presented for our decision is a narrow one, namely, whether the custody requirement for habeas corpus relief is satisfied where a prisoner's prior conviction, although expired, is used to enhance the sentence on a current or future term. We conclude the custody requirement is satisfied in such a case. Where the State uses a prior conviction to enhance a present or future sentence, fairness requires that such restraints on individual liberty be justified. See Hensley v. Municipal Court, 411 U.S. 345, 350-51, 93 S.Ct. 1571, 1574, 36 L.Ed.2d 294 (1973).

Cook v. Maleng, supra, 847 F.2d at 619.

The Ninth Circuit's decision on this issue is clearly consistent with relevant holdings of this Court. See, e.g.,

Burgett v. Texas, 389 U.S. 109, 19 L.Ed.2d 319, 88 S.Ct. 258 (1967) (use of constitutionally invalid prior conviction in a state recidivist prosecution renews the constitutional infirmity); United States v. Tucker, 404 U.S. 443, 30 L.Ed.2d 592, 92 S.Ct. 589 (1972) (constitutionally invalid prior convictions could not be considered at sentencing when they may have resulted in a longer term); Johnson v. Mississippi, 486 U.S. ___, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988) (constitutionally invalid prior conviction cannot be used to support sentence of death resting on aggravating circumstance requiring proof of previous serious felony conviction; post-conviction relief must be available to cure the defect).

On the narrow issue of "custody" upon direct enhancement, the Ninth Circuit also agrees with every other circuit which has faced it directly. E.g., United States ex rel. Durocher v. LaVallee, 330 F.2d 303, 306 (2nd Cir.) (en banc), cert. denied, 377 U.S. 998 (1964); Lyons v. Brierly, 435 F.2d 1241, 1215-1216 (3rd Cir. 1970); Young v. Lynaugh, 821 F.2d 1133, 1136-1138 (5th Cir. 1987); Harrison v. Indiana, 597 F.2d 115, 116-117 (7th Cir. 1979) and cases cited therein; Aziz v. LaFeure, 830 F.2d 184, 186 (11th Cir. 1987).

The circuit cases the State claims are to the contrary (Petition at 6-7) are not directly contrary. Most of those cases do not deal with "custody" claims by prisoners who claimed a direct, specific enhancement of a current or future state sentence due to an expired conviction from the same state. Harris v. Ingram, 683 F.2d 97 (4th Cir. 1982), involved a §2254 challenge to a Virginia conviction which the petitioner claimed was enhancing his federal sentence due solely to federal law provisions. The Fourth Circuit found no §2254 "custody" because the federal prisoner was not subject to further Virginia custody,

then or in the future. Therefore, only a §2255 petition might be cognizable. Likewise, in Ward v. Knoblock, 738 F.2d 134, 138 (6th Cir. 1984), the court held only that §2254 "custody" does not extend to a federal prisoner who had no current or future state sentence to be enhanced, "who has fully served the [state] sentence under attack, and is no longer in any meaningful sense in the custody of the state which imposed that sentence" and said it would not "expand the right to apply for the writ to a case where. . . petitioner's liberty is not at all restrained by the state which imposed the sentence which he was served and now wishes to exclusively attack." (Emphasis added) Again, only a §2255 petition would be available because the petitioner faced only federal custody. This is demonstratably not the situation in the present case: Mr. Cook has a lengthy Washington State prison sentence to serve, a sentence which is directly enhanced by the expired conviction from the same state. Only Cotton v. Mabry, 674 F.2d 701 (8th Cir. 1982), cert. denied, 459 U.S. 1015 (1982) even arguably supports the State's position. But Cotton provides only the weakest hint of support because it is not clear whether a direct, specific current sentence enhancement due to the expired conviction was at issue. The court in Cotton found only that any "influence which the five-year sentence may have had on the subsequent sentences" was not sufficient to confer "custody". 674 F.2d at 703. (Emphasis added) Moreover, even if a specific enhancement was present, Cotton lacks the type of serious analysis of the issue which is present in the other circuit decisions on this issue.[8]

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8. The Cotton result is based only on Harvey v. South Dakota, 526 F.2d 840 (8th Cir. 1976), a case in which an expired conviction was attacked when there was no present or future custody of any type pending. Not surprisingly, Harvey held there was no "custody". The Cotton opinion totally fails, however, to discuss any of the authority holding even then that direct enhancements from old sentences do constitute "custody".

On the issue actually before the Ninth Circuit, i.e. a direct enhancement of a specific length of prison time due solely to the expired conviction, the Ninth Circuit's decision was clearly correct. There is "custody" on the old conviction sufficient to confer habeas jurisdiction when a prison term is specifically lengthened in this way. There is no flaw in the Ninth Circuit's reasoning on this easily-answered "custody" question.

II. THE NINTH CIRCUIT'S HOLDING DOES NOT AFFECT THE FINALITY OF STATE CONVICTIONS UNLESS THOSE CONVICTIONS ARE USED TO DIRECTLY INCREASE PRISON TIME ON PRESENT OR FUTURE STATE SENTENCES; SUCH CONVICTIONS MUST REMAIN OPEN TO COLLATERAL ATTACK SO THAT STATES DO NOT ATTEMPT TO LENGTHEN PRISON TERMS BASED ON UNCONSTITUTIONALLY OBTAINED CONVICTIONS.

The State's allegations regarding the effects of the Ninth Circuit decision are simply wrong. The State claims that "the Ninth Circuit has adopted a rule that essentially means that state court convictions are never final". Petition at 4. This is untrue: Under the Ninth Circuit's rule, state court convictions on which the sentence has expired can be attacked collaterally only if the State affirmatively and directly enhances a new prison term by using the expired conviction. If the State never attempts to use the expired conviction in this way, it will never be subject to federal habeas corpus relief. The State itself thus determines ultimate "finality": If the State never resurrects an old conviction in an attempt to make a new term longer, that conviction will never be "live" enough to establish sufficient "custody" to confer habeas corpus jurisdiction. Compare e.g., Burgett v. Texas, supra (state's use of old unconstitutionally-obtained conviction to enhance penalties renews the constitutional violation).

The State also misconstrues what is fair and what is not fair with respect to sentencing systems relying upon prior

convictions for enhancement. See Petition at 7-8, claiming unfairness to the State. But the equities cut exactly the opposite way: As this Court has often made clear, the State's use of prior convictions to directly enhance prison terms would be patently unfair unless a mechanism to test the continuing validity of those convictions is provided. The State can hardly seek to keep persons in its prisons longer based on "evidence" which is constitutionally suspect. See Burgett v. Texas, supra; United States v. Tucker, supra; Johnson v. Mississippi, supra.

III. THERE IS NO ISSUE PRESENTED REGARDING PREJUDICE TO THE STATE FROM ALLEGED DELAY IN FILING THE HABEAS PETITION.

There is no issue here regarding the alleged unavailability of evidence to refute the habeas petition, as incorrectly suggested in the Petition at 8-10. The State made such a claim in the District Court, pursuant to Rule 9(a) of the Rules Governing §2254 Proceedings In The United States District Courts. But that court did not reach this issue, holding as a threshold matter that it lacked subject matter jurisdiction because it believed Mr. Cook was not "in custody". See District Court opinions, Appendices B and C to the Petition herein. Accordingly, the Court of Appeals also reached no such issue because Mr. Cook's appeal was purely on the "in custody" question on which the District Court did rule. See Court of Appeals Opinion, Appendix A to the Petition. There is no record and no ruling on this claim.

In these circumstances, there is no issue presented in this Court. The issue, if it is one, remains open on remand to the District Court.

CONCLUSION

For the foregoing reasons, the petition for writ of

APPENDIX A

Former RCW 9.41.025 (Pertinent Part):

9.41.025 Committing crime when armed—Penalties—"Inherently dangerous" defined—Resisting arrest. Any person who shall commit or attempt to commit any felony, or any misdemeanor or gross misdemeanor categorized herein as inherently dangerous, while armed with, or in the possession of any firearm, shall upon conviction, in addition to the penalty provided by statute for the crime committed without use or possession of a firearm, be imprisoned as herein provided.

(1) For the first offense the offender shall be guilty of a felony and the court shall impose a sentence of not less than five years, which sentence shall not be suspended or deferred.

(2) For a second offense, or if, in the case of a first conviction of violation of any provision of this section, the offender shall previously have been convicted of violation of the laws of the United States or of any other state, territory or district relating to the use or possession of a firearm while committing or attempting to commit a crime, the offender shall be guilty of a felony and shall be imprisoned for not less than seven and one-half years, which sentence shall not be suspended or deferred.

(3) For a third or subsequent offense, or if the offender shall previously have been convicted two or more times in the aggregate of any violation of the law of the United States or of any other state, territory or district relating to the use or possession of a firearm while committing or attempting to commit a crime, the offender shall be guilty of a felony and shall be imprisoned for not less than fifteen years, which sentence shall not be suspended or deferred;

(4) Misdemeanors or gross misdemeanors categorized as "Inherently Dangerous" as the term is used in this statute means any of the following crimes or an attempt to commit any of the same: Assault in the third degree, provoking an assault, interfering with a public officer, disturbing a meeting, riot, remaining after warning, obstructing firemen, petit larceny, injury to property, intimidating a public officer, shoplifting, indecent liberties, and soliciting a minor for immoral purposes.

APPENDIX B:

RCW 9.95.009(2):

(2) After July 1, 1984, the board shall continue its functions with respect to persons convicted of crimes committed prior to July 1, 1984, and committed to the department of corrections. When making decisions on duration of confinement, and parole release under RCW 9.95.100 and 9.95.110, the board shall consider the purposes, standards, and sentencing ranges adopted pursuant to RCW 9.94A.040 and the minimum term recommendations of the sentencing judge and prosecuting attorney, and shall attempt to make decisions reasonably consistent with those ranges, standards, purposes, and recommendations: *Provided*, That the board and its successors shall give adequate written reasons whenever a minimum term or parole release decisions [decision] is made which is outside the sentencing ranges adopted pursuant to RCW 9.94A.040. In making such decisions, the board and its successors shall consider the different charging and disposition practices under the indeterminate sentencing system.

APPENDIX C

1) RCW 9.94A.310 (Pertinent Part):

9.94A.310. Table 1—Sentencing grid

TABLE 1

Sentencing Grid

SERIOUSNESS SCORE	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XIV	Life Sentence without Parole/Death Penalty									
XIII	23 yrs 240- 320	24 yrs 250- 333	25 yrs 261- 347	26 yrs 271- 361	27 yrs 281- 374	28 yrs 291- 388	30 yrs 312- 416	32 yrs 330- 450	36y 370- 493	40y 411- 548
XII	12y 123- 164	13y 134- 178	14y 144- 192	15y 154- 205	16y 165- 219	17y 175- 233	19y 195- 260	21y 216- 288	25y 257- 342	29y 298- 397
XI	6y 62- 82	6y6m 69- 92	7y6m 77- 102	8y3m 85- 113	9y 93- 123	9y6m 100- 133	12y6m 129- 171	12y6m 134- 183	15y6m 159- 212	17y6m 184- 246
X	3y 31-	3y6m 36-	4y 41-	4y6m 46-	5y 52-	7y6m 77-	9y6m 98-	60y12m 102-	12y6m 129-	14y6m 149-

2) RCW 9.94A.320 (Pertinent Part):

9.94A.320. Table 2—Crimes included within each seriousness level

TABLE 2

CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

XIV Aggravated Murder 1 (RCW 10.95.020)
XIII Murder 1 (RCW 9A.32.030)
Homicide by abuse (RCW 9A.32.055)
XII Murder 2 (RCW 9A.32.050)
XI Assault 1 (RCW 9A.36.011)

3) RCW 9.94A.360(9):

(9) If the present conviction is for Murder 1 or 2, Assault 1, Kidnaping 1, or Rape 1, count three points for prior adult and juvenile convictions for crimes in these categories, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and ½ point for each prior juvenile nonviolent felony conviction.

No. 88-357

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

NORM MALENG, King County Prosecuting Attorney; AMOS E. REED, Secretary of the Washington State Department of Social & Health Services; KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

JOHN MIDGLEY
Counsel of Record
SMITH, MIDGLEY
& PUMPLIN, P.S.
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Olympia, WA 98504
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Counsel for Petitioners

PETITION FOR WRIT OF CERTIORARI
FILED AUGUST 27, 1988
WRIT OF CERTIORARI GRANTED
NOVEMBER 7, 1988

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

TABLE OF CONTENTS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN CASE NO. 88-357

1. October 30, 1985 — Respondent Mark Edwin Cook files his Petition for Writ of Habeas Corpus alleging his 1958 robbery conviction was unconstitutional and that it was thereafter used to enhance his 1978 sentences. Docket No. C85-1943D (CR 1).

2. December 11, 1985 — Petitioners file their Motion to Dismiss for lack of jurisdiction and laches (CR 9).

3. January 21, 1986 — Respondent files his "Reply to Response on Petitioner's Memorandum of Authorities Opposing the State's Motion to Dismiss" (CR 17).

4. March 24, 1986 — Magistrate's Report and Recommendation recommends the District Court dismiss Mr. Cook's Petition for lack of subject matter jurisdiction (CR 21).

5. April 4, 1986 — Respondent Cook files his objections to the Magistrate's Report and Recommendation (CR 22).

6. May 19, 1986 — District Court dismisses Mr. Cook's Petition for lack of subject matter jurisdiction (CR 25).

7. June 2, 1986 — Respondent Cook files his Motion for Reconsideration of the Order dismissing his Petition (CR 26).

8. June 19, 1986 — Respondent Cook moves the District Court for a Certificate of Probable Cause to appeal (CR 27).

9. July 16, 1986 — District Court denies Mr. Cook's Motion for Certificate of Probable Cause (CR 31).

10. July 25, 1986 — Respondent Cook moves the Court of Appeals for a Certificate of Probable Cause.

11. September 8, 1986 — Court of Appeals for the Ninth Circuit denies Mr. Cook's Motion without prejudice upon his moving for and being granted an extension of time to file a new Notice of Appeal (CR 34).

12. September 15, 1986 — Respondent Cook moves District Court for an extension of time to file a new notice of appeal and files a new Notice of Appeal (CR 36).

13. September 15, 1986 — District Court grants Respondent Cook's Motion for Extention of Time to File Appeal (CR 38).

14. February 13, 1987 — Court of Appeals for the Ninth Circuit grants Mr. Cook a Certificate of Probable Cause.

15. June 2, 1988 — Court of Appeals for the Ninth Circuit reverses the District Court, finding Mr. Cook was sufficiently "in custody" to confer subject matter jurisdiction and remands for further proceeding. Docket No. 86-4151.

16. August 27, 1988 — Petitioners file their Petition for Writ of Certiorari. Docket No. 88-357.

17. November 7, 1988 — United States Supreme Court grants Writ of Certiorari.

MARK EDWIN COOK'S PETITION FOR WRIT OF HABEAS CORPUS [FILED OCTOBER 30, 1985]

AO 241
REV 6/83

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: Western District of Washington
Name: MARK EDWIN COOK	Prisoner No.: 20025-118(fed) 027800(state)
Place of Confinement: United States Penitentiary Lompoc, California 93436	
Name of Petitioner (include name under which convicted): MARK EDWIN COOK	Name of Respondent (authorized person having custody of petitioner): V. NORM MALENG, King County Prosecuting Attorney, ANNE REED, Secretary of the Washington State Department of Social & Health Services,
The Attorney General of the State of: Washington, KENNETH O. EIKENBERRY	

FILED
LODGED
RECEIVED

SEP 30 1985

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Washington State Superior Court for King County at Seattle, Washington

2. Date of judgment of conviction: May 7, 1958

3. Length of sentence: Three 20-year terms running concurrently

4. Nature of offense involved (all counts): Three counts of robbery

5. What was your plea? (Check one)
   (a) Not guilty [X]
   (b) Guilty [ ]
   (c) Nolo contendere [ ]
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one)
   (a) Jury [X]
   (b) Judge only [ ]

7. Did you testify at the trial?
   Yes [ ] No [ ]

8. Did you appeal from the judgment of conviction?
   Yes [ ] No [X]

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REV 6/82

9. If you did appeal, answer the following:

(a) Name of court _____

(b) Result _____

(c) Date of result _____

(d) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court Court of Appeals of Washington State, Division I

(2) Nature of proceeding Personal Restraint Petition

(3) Grounds raised That the conviction was obtained in violation of due process because the trial court failed to hold a competency hearing after finding there was a reasonable doubt as to my sanity (competency to stand trial).

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result petition denied

(6) Date of result 3/22/84

(b) As to any second petition, application or motion give the same information:

(1) Name of court Supreme Court of the State of Washington

(2) Nature of proceeding Motion for Discretionary Review

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(3) Grounds raised Conviction obtained in violation of due process because the trial court failed to hold a competency hearing after finding there was a reasonable doubt as to my sanity (competency to stand trial)

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result motion denied

(6) Date of result 7/20/84 & 9/21/84

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐
(2) Second petition, etc. Yes ☒ No ☐
(3) Third petition, etc. Yes ☐ No ☐

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not.

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may have any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds relating to this conviction on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Conviction obtained in violation of due process of law where court failed to hold a competency hearing.

Supporting FACTS (tell your story briefly without citing cases or law): Prior to my trial in 1958, the trial judge made a finding that there was a reasonable doubt as to my sanity based upon my history of confinement in mental institutions. He ordered a commission of doctors to examine me and I believe I was examined. Although there was no record of a competency hearing nor a finding of competency of any kind, I was tried and found guilty of all charges. I contend that I was incompetent to stand trial and thus was convicted in violation of due process.

B. Ground two: My Washington State sentence under King County Cause No. 76960 has been unlawfully enhanced on the information of an invalid 1958 conviction.

Supporting FACTS (tell your story briefly without citing cases or law): On January 6, 1976, I was sentenced in the King County Superior Court to two life terms for two counts of first degree assault and a ten year term for one count of aiding a prisoner to escape. Under the Washington State enhancement statutes, it is mandatory that a prisoner who is convicted three times of felony must serve a mandatory term of 15 years before he/she is eligible for parole. A person having two felony convictions must serve a seven and a half year mandatory term before being eligible for parole. Because of the invalid 1958 conviction, I will have to serve twice as much time before I am eligible for parole than I would if the invalid conviction were reversed. I contend that I will be illegally imprisoned if the invalid conviction is not reversed and that this will be a violation of due process.

C. Ground three: My federal sentence under Eastern District of Washington Case No. CR78-047 has been unlawfully enhanced pursuant to an invalid conviction.

Supporting FACTS (tell your story briefly without citing cases or law): On August 9, 1978, I was sentenced in the U.S. District Court to 25 years for aiding a bank robbery, and 5 years for a conspiracy. Under the U.S.Parole Statutes, the Parole Commission is authorized to establish paroling guidelines which are based, in part, on prior felony convictions and commitments. (See 28 C.F.R. 2.20). Because of the invalid conviction(1958), commitment thereon, and the subsequent parole from the commitment, the Parole Commission has calculated that I will have to do the entire sentence term without becoming eligible for parole. I contend that I am being imprisoned illegally because the invalid conviction is being used substantially as a basis for denying me early parole in violation of due process.

D. Ground four: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: John Allen, Seattle,Wn.(1958 state case); Phil Strohberg, Seattle, Wn.(1976 state case); Ted Schenker, Richland,Wn.(1978 federal case).

(b) At arraignment and plea: John Allen, Seattle,Wn.(1958 state case); John Browne, Seattle, Wn.(1976 federal case); Phil Strohberg, Seattle,Wn.(1976 state case)

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(c) At trial John Allen, Seattle, Wn.(1958 state case); Bob Caissler, Kirkland,Wn.(1976 federal case); Phil Ginsberg, Seattle,Wn.(1976 state case).

(d) At sentencing John Allen, Seattle,Wn.(1958 state case); Bob Caissler, Kirkland,Wn. (1976 federal case); John Browne, Seattle,Wn.(1978 state case).

(e) On appeal Tim Ford, Seattle,Wn.(1976 federal case); Wayne Lieb, Olympia,Wn.(1976 state case).

(f) In any post-conviction proceeding John Midgley, Seattle,Wn.(1984 state Personal Restraint Petition)

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☒ No ☐
(a) If so, give name and location of court which imposed sentence to be served in the future: sentence imposed on conviction under attack has expired. I am presently serving federal sentence, I have not begun future state sentence(King County Superior Court, Seattle,Wn.)

(b) Give date and length of the above sentence: Future state sentence is life term to begin after release from federal custody.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

Sept. 25, 1985
(date)

Mark Edwin Cook
Signature of Petitioner

FILED
LODGED
RECEIVED

SEP 30 1985

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

C85-1943

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

MARK EDWIN COOK,

Defendant.

NO. 7 6 9 6 9

MOTION AND AFFIDAVIT AND ORDER OF DISMISSAL OF THE SUPPLEMENTAL INFORMATION ALLEGING THE DEFENDANT TO BE AN HABITUAL CRIMINAL

COMES NOW Christopher T. Bayley, Prosecuting Attorney for King County, Washington, by and through his deputy, James F. Hoover, and moves the court for an order dismissing the supplemental information alleging the defendant, Mark Edwin Cook, to be an habitual criminal, for the reasons as set forth in the affidavit attached hereto.

CHRISTOPHER T. BAYLEY
Prosecuting Attorney

By JAMES F. HOOVER
Deputy Prosecuting Attorney

STATE OF WASHINGTON)
: ss.
COUNTY OF K I N G)

JAMES F. HOOVER, being first duly sworn on oath, deposes and says:

That he is a deputy prosecuting attorney in and for King County, Washington; that he is familiar with the records and files herein; that the state of Washington filed a supplemental information on 6 October 1976 alleging that the defendant Mark Edwin Cook was an habitual criminal; that proof of this allegation was [illegible] in part upon proof of the defendant's conviction of the robbery, Counts I, II, III

CHRISTOPHER T. BAYLEY
Prosecuting Attorney
W554 King County Courthouse
Seattle, Washington 98104
344-7500

on 7 May 1958 in King County Cause No. 31530; that the court file in King County Cause No. 31530 shows that on 4 March 1958 an order was signed appointing the commission of a physician to examine Mark Edwin Cook, the court finding a reasonable doubt existing as to the sanity of the defendant; subsequent court documents indicate that the defendant was in fact examined; however, no documents exist to indicate that the defendant was found competent to stand trial prior to the trial in which he was convicted; that an investigation of the Office of the King County Prosecuting Attorney shows that no order of competency was filed, no transcript of a competency hearing exists and the entries of the clerk of the court do not show that either a hearing to determine competency was held subsequent to 4 March 1958 or that a finding of competency was made; that for the above facts and reasons your affiant believes that the 7 May 1958 conviction can not be used for the purposes of proving the allegations in the supplemental information; that the supplemental information should be dismissed in the interests of justice; and that the defendant will be sentenced in King County Cause No. 76969 without the enhanced penalty of the habitual criminal statute.

JAMES F. HOOVER

SUBSCRIBED and SWORN to before me this 14th day of November, 1977.

NOTARY PUBLIC in and for the state of Washington, residing at Seattle.

Motion and Affidavit and Order of Dismissal of the Supplemental Information Alleging The Defendant to be an Habitual Criminal -

CHRISTOPHER T. BAYLEY
Prosecuting Attorney
W554 King County Courthouse
Seattle, Washington 98104
344 7550

ORDER

IT APPEARING from the motion and affidavit that the ends of justice do not warrant further proceedings in regards to the supplemental information alleging the defendant to be an habitual criminal; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the supplemental information alleging the defendant to be an habitual criminal, and the same hereby is, dismissed.

DONE IN OPEN COURT this 14th day of November, 1977.

JUDGE

Presented by:

JAMES F. HOOVER
Deputy Prosecuting Attorney

Motion and Affidavit and Order of Dismissal of the Supplemental Information Alleging The Defendant to be an Habitual Criminal - 3

CHRISTOPHER T. BAYLEY
Prosecuting Attorney
W554 King County Courthouse
Seattle, Washington 98104
344 7550

THE SUPREME COURT OF WASHINGTON

In the Matter of the Personal Restraint Petition of

MARK EDWIN COOK,

Petitioner.

NO. 50485-7

RULING DENYING MOTION FOR DISCRETIONARY REVIEW

By this motion, Mark Edwin Cook seeks discretionary review by this court of an order of the Acting Chief Judge of Division One of the Court of Appeals dismissing his personal restraint petition. The only issue remaining in the case at this stage concerns Mr. Cook's challenge to his 1958 King County conviction of three counts of robbery. The Acting Chief Judge characterized this challenge as a claim that Mr. Cook's 1958 conviction "was illegal in that he was incompetent to stand trial resulting in the violation of his constitutional rights." The Acting Chief Judge concluded, however, that Mr. Cook had failed to sustain his burden of showing that the alleged constitutional error worked to his actual and substantial prejudice.

As a preliminary matter, I must note that the King County Prosecutor has evidenced an apparent aversion to discussing whether there was error in connection with the 1958 conviction, whether the alleged error was prejudicial, and even the burden of making either showing. Instead, the prosecutor maintains that Mr. Cook is not under restraint as a result of the 1958 conviction because the maximum 20-year term of imprisonment on that conviction has expired. As Mr. Cook points out, however, this position is highly questionable in light of the actual and potential consequences to him of having the conviction on his record. There appears to be sufficient existing "restraint" within the meaning of RAP 16.4(b) to warrant relief if relief is otherwise

called for. In re Powell, 92 Wn.2d 883, 887-88, 602 P.2d 711 (1979); In re Richardson, 100 Wn.2d 669, 670, 675 P.2d 209 (1983).

Mr. Cook has probably also made an adequate showing of prejudice, assuming for the moment that he has successfully demonstrated that error occurred. This is because the cases which Mr. Cook cites establish both that it is constitutional error to try an incompetent defendant and that a competency hearing is necessary where a reasonable doubt exists about competency.

The serious flaw in Mr. Cook's case is that he has not really claimed, and apparently cannot show, that he was not found competent prior to his 1958 trial. He has only claimed that a referral for a competency evaluation occurred, and that no record now exists to show that a hearing took place and that he was found competent.

As to the unavailability of a record, Mr. Cook's assertion is supported by a pleading filed by the State in a 1977 prosecution against him. In that pleading the State conceded, for purposes of voluntarily dismissing a supplemental information alleging Mr. Cook to be a habitual criminal, that inadequate records existed for the State to demonstrate the validity of the 1958 conviction.

The State's apparent inability in 1977 to prove that a competency hearing took place in 1958 is not, however, conclusive. This is because the State carried the burden in the 1977 proceeding, whereas Mr. Cook carries the burden here. In the context of a personal restraint petition, it is the petitioner who must make a prima facie showing of error. In re Hagler, 97 Wn.2d 818, 650

P.2d 1103 (1982). In my view, Mr. Cook cannot make the requisite showing merely by suggesting a possible error that the State can no longer prove did not occur. This is all Mr. Cook's pleadings, fairly read, contain.

Given this analysis, I cannot conclude that the Acting Chief Judge committed obvious or probable error in dismissing Mr. Cook's personal restraint petition. There is therefore no basis for further review by this court under the standards of RAP 13.5(b). The motion for discretionary review is denied.

DATED at Olympia, Washington this 26th day of July, 1984.

COMMISSIONER

STATE'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PETITION [FILED DECEMBER 11, 1985]

Mag. Sweigert

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARK EDWIN COOK Petitioner vs NORM MALENG, et al., Respondents	NO. C85-1943D MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

I. BASIS FOR CUSTODY

The petitioner is not in custody as the result of his conviction in King County Cause No. 31530 on May 7, 1958, of three counts of Robbery. Rather, he is in federal custody in Lompoc, California. Petitioner's sentence in King County Cause No. 31530 expired twenty years after it was entered, on May 6, 1978. See Exhibit 1 and Exhibit 2, true and correct copies of Judgment and Sentence and Warrant of Commitment.

II. ARGUMENT

BECAUSE THE PETITIONER IS NOT "IN CUSTODY" THIS COURT LACKS JURISDICTION OVER THE SUBJECT MATTER AND MUST DISMISS HIS PETITION.

28 U.S.C. §2241 which establishes the power of district courts to grant writs of habeas corpus, and 28 U.S.C. §2254 both require that a habeas corpus petitioner be in custody at the time the petition is filed.

MICHAEL P. LYNCH
Assistant Attorney General
Department of Corrections
P.O. Box 9699 FN-61
Olympia, WA 98504
(206) 754-1415

Specifically, 28 U.S.C. §2254(a) states:

> The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. (emphasis added).

This court would have had jurisdiction over petitioner's petition even if he had been on parole from his 1958 conviction at the time that he filed the petition. See Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373 (1963); Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556 (1968).

However, because petitioner's maximum sentence had expired more than seven years prior to the institution of the instant habeas corpus proceeding, he does not meet the statutory "in custody" requirement.

As noted by the Supreme Court in Carafas v. LaValle, supra, 88 S.Ct. at 1560:

> The federal habeas corpus statute requires that the applicant must be "in custody" when the application for habeas corpus is filed. This is required not only by the repeated references in the statute, [footnote omitted], but also by the history of the great writ.

In short, because petitioner was not in custody at the time that he filed his petition this court lacks subject matter jurisdiction and his petition should be dismissed.

Petitioner's claim that he is suffering "collateral consequences" from his 1958 conviction goes to the question of mootness not jurisdiction. Because this court lacks

subject matter jurisdiction, there is no issue over which to argue a matter of mootness.

III. ARGUMENT

PETITIONER'S PETITION IS BARRED BY THE DOCTRINE OF LACHES.

Even if this court were to find that it did have subject matter jurisdiction over petitioner's sentence, the petition itself would be barred as being a delayed petition under Rule 9 of the Rules Governing §2254 Cases.

Petitioner's conviction was in 1958, and yet he waited 27 years before he raised the issue of competency in the federal court.

Without question the state is severely prejudiced in its ability to respond to the issue raised in petitioner's petition. All that can be discerned from what is left of the state court record is that the trial court appointed a commission of physicians consisting of Dr. Ardis J. Candy and Dr. Jack J. Klein to examine the petitioner to determine the question of sanity. See Exhibit 3. And, that the petitioner was delivered to the King County Hospital for purposes of medical examination on March 7, 1958. See Exhibit 4. And, the petitioner was examined by Drs. Klein and Candy and that the doctors were paid. See Exhibit 5. This is all that the state court record reveals. The state court record does not contain a copy of any report which may have been submitted by Drs. Klein and Candy. See affidavit of counsel.

The respondents have been unable to locate Drs. Klein or Candy and is unaware whether they are still alive. See affidavit of counsel. The King County Prosecuting Attorney has not been able to find its file in this case. See affidavit of counsel. The defense attorney, Mr. Jack R. Allen, has destroyed his file in Mr. Cook's case. See affidavit of counsel. The defense attorney has no recollection of what occurred in 1958 with regard to Mr. Cook's competency.

Neither of the two deputy prosecutors who tried the case have any recollection of competency being at issue in the case. See affidavit of counsel. Finally, the Clerk's Office is unable to locate any court reporter notes and believes it probable that said notes have been destroyed. See affidavit of counsel.

In a nutshell, neither the defense attorney nor the prosecutors can remember what happened with regard to the issue of petitioner's competency and the record which was reduced to microfiche a number of years ago no longer contains copies of any psychiatric reports which would have been submitted by Drs. Klein and Candy, nor does the record reflect what proceedings may have occurred, been waived, or what stipulations may have been entered with regard to the question of competency.

It is impossible for the state to respond to petitioner's contention regarding competency. He was at least aware of this claim in 1977 when the same problems with regard

to the location of the state court record were raised in King County Cause No. 76969. See attached Motion and Affidavit, attached to Petitioner's Brief in Support of Petition for Writ of Habeas Corpus.

Petitioner's inexcusable delay in waiting over 27 years for challenging his conviction in federal court has prejudiced the state and the state respectfully requests that petitioner's habeas corpus petition be denied pursuant to Rule 9(a) of the Rules Governing §2254 Proceedings.

DATED this 10th day of December, 1985.

Respectfully submitted,

MICHAEL P. LYNCH
Assistant Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARK EDWIN COOK Petitioner vs NORM MALENG, et al., Respondents	NO. C85-1943D AFFIDAVIT OF MICHAEL P. LYNCH

STATE OF WASHINGTON)
) ss
County of Thurston)

MICHAEL P. LYNCH, being first duly sworn upon oath, deposes and says that:

I.

I, MICHAEL P. LYNCH, am the Assistant Attorney General assigned to represent the respondent in the above-referenced cause. In that capacity I have attempted to locate the state court records, and have contacted numerous individuals with regard to what occurred with regard to petitioner's competency hearing, all to no avail.

II.

I had the King County Prosecuting Attorney's Office send me a complete copy of the state court record, or what is left of it, from the microfiche section of the King County Clerk's Office. That record does not contain a copy of any reports which would have been submitted by Drs. Klein and Candy after they examined the petitioner for competency.

III.

There is no listing for either a Dr. Klein or a Dr.

Candy in the Seattle phone book and the respondent does not know how to locate either of the doctors, if they are still alive.

IV.

The Prosecuting Attorney's Office has advised me that they have been unable to find their file in King County Cause No. 31530. I contacted Superior Court Judge Frank Sullivan who was the lead Deputy Prosecuting Attorney in Mr. Cook's case in 1958, and he told me that he had no recollection of whether competency was even raised as a defense in Mr. Cook's case.

V.

I contacted Washington State District Court Judge Jim Cook, who was the back-up Prosecuting Attorney in the petitioner's case and he does not remember competency being an issue in the case.

VI.

I contacted the petitioner's defense attorney, Mr. Jim R. Allen, who stated to me that he had no recollection of what transpired with regard to a competency issue in the petitioner's 1958 case, he also advised me that he had destroyed Mr. Cook's case file.

VII.

I have also contacted the King County Clerk's Office in an attempt to find out if they have any court reporter notes which would pertain to the petitioner's competency.

They have advised me that they cannot locate any court reporter notes in petitioner's case and that those notes probably have been destroyed.

VIII.

The respondent has been severely prejudiced in its ability to find any information about what occurred with regard to the petitioner's competency claim and is totally unable to respond to this issue, as the result of petitioner's 27 year delay in raising this issue. Memories have failed and state court records have either been lost or destroyed.

FURTHER AFFIANT SAYETH NAUGHT.

MICHAEL P. LYNCH

SUBSCRIBED AND SWORN to before me this 10 day of December, 1985.

Notary Public in and for the State of Washington, residing at Olympia.

No. 1677 - [illegible]

In the Superior Court of the State of Washington
For the County of King

THE STATE OF WASHINGTON, Plaintiff,
vs.
[illegible] COOK, Defendant

No. 31530

JUDGMENT AND SENTENCE

FILED
MAY 7 PM 2 12

The Prosecuting Attorney with the Defendant MARK EDWIN COOK in person and counsel John R. Allen came into Court. The Defendant was duly informed by the Court of the nature of the information filed against him for the crime of ROBBERY, COUNTS I, II and III - COUNT I committed on or about the 15th day of October, 1957, COUNT II on or about the 4th day of November, 1957 and COUNT III on or about the 13th day of December, 1957, of his arraignment and plea of "Not guilty to the offense charged in the information," of his trial and the verdict of the jury on the 15th day of April, 1958, "guilty of ROBBERY, COUNTS I, II and III as charged in the information herein"

The Defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had none.

And no sufficient cause being shown or appearing to the Court, the Court renders its judgment: That whereas the said Defendant having been duly convicted under on the 15th day of April, 1958 in the Superior Court of the crime of ROBBERY, COUNTS I, II and III

It is therefore ORDERED, ADJUDGED AND DECREED that the said Defendant is guilty of the crime of ROBBERY, under COUNTS I, II and III

and that he be confined in the REFORMATORY of the State of Washington, at McNeil Island, for a period not to exceed FIFTEEN YEARS on COUNT I, TWENTY YEARS on COUNT II and TWENTY YEARS on COUNT III and a minimum term to be fixed by the BOARD OF PRISON TERMS AND PAROLES.

Said sentences on COUNTS I, II and III to run concurrently

The Defendant is hereby remanded to the custody of the Sheriff of said County to be by him detained until delivered into the custody of the proper officers for transportation to the said REFORMATORY.

Done in open Court this 7th day of May, 19 58

Judge

Presented by:
Francis L. Sullivan
Deputy Prosecuting Attorney

EXHIBIT 1

In the Superior Court of the State of Washington
For the County of King

17696

THE STATE OF WASHINGTON, Plaintiff,

vs.

Mark Edwin Cook, Defendant.

No. 31530

WARRANT OF COMMITMENT

TO REFORMATORY

OFFICE OF THE COUNTY CLERK OF KING COUNTY,
State of Washington.

I, NORMAN R. RIDDELL, County Clerk of King County, and ex-officio Clerk of the Superior Court of the State of Washington for the County of King, do hereby certify the foregoing to be full, true and correct copy of the Judgment and Sentence duly made by the Hon. Malcolm Douglas Judge of said Court on the 7th day of May, 1958, in the above entitled action, now on record in my office

ATTEST, my hand and the seal of said Superior Court this 10th day of June A. D. 1958

NORMAN R. RIDDELL, County Clerk

By ..... Deputy

THE STATE OF WASHINGTON to the SHERIFF of King County and the Superintendent and Officers in charge of the REFORMATORY of the State of Washington, GREETING:

WHEREAS, Mark Edwin Cook has been duly convicted in the Superior Court of the State of Washington, for the County of King, of the crime of Robbery under Counts I, II and III

and judgment has been pronounced against him that he be punished by imprisonment in the REFORMATORY of the State of Washington at Monroe, for a maximum term of not more than twenty years on Count I eight years on Count II and twenty years on Count III and a minimum term to be fixed by the BOARD OF PRISON TERMS AND PAROLES, said sentences on Counts I, II, and III to run concurrently

All of which appears to us of record; a certified copy of said judgment being endorsed hereon and made a part hereof

NOW, THIS IS TO COMMAND YOU, the said Sheriff, to detain the said Mark Edwin Cook until called for by the officer or officers authorized to conduct him to the State REFORMATORY, and this is to command you, the said Superintendent and Officers in charge of said REFORMATORY to receive of and from the said officer or officers the said Mark Edwin Cook, convicted and sentenced as aforesaid, and the said, keep and confine at said REFORMATORY of the State of Washington for a maximum term of not more than 20 years, on Count I; 20 years on Count II; and 20 years on Count III, said sentences to run concurrently and a minimum term to be fixed by the BOARD OF PRISON TERMS AND PAROLES.

And these presents shall be authority for the same. HEREIN FAIL NOT.

WITNESS, Hon. Malcolm Douglas Judge of the said Superior Court and the seal thereof this 10th day of June A. D. 19 58

NORMAN R. RIDDELL, County Clerk

By ..... Deputy

EXHIBIT 2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,
Plaintiff.
vs.
MARK EDWIN COOK,
Defendant.

NO. 31530
ORDER APPOINTING COMMISSION OF PHYSICIANS.

This cause coming on [illegible] hearing in open Court on the motion of John R. Allen, the court-appointed attorney for Mark Edwin Cook in the above-entitled cause, asking that a commission be appointed for the purpose of determining the sanity of the defendant, Mark Edwin Cook, it appearing that said defendant is without sufficient means to meet the costs of such an examination, and it appearing that reasonable doubts exist as to the sanity of the said defendant,

It is now Ordered that a Commission of Physicians consisting of Dr. [illegible] ARDIS L. CAREY and Dr. JACK J. KLEIN is hereby appointed for the purpose of examining the defendant Mark Edwin Cook, to determine the question of the sanity of the said Mark Edwin Cook.

Done in Open Court this [illegible] day of March, 1958.

Presented by:

John R. Allen
Attorney for Defendant

Notice of Presentation waived:

[illegible]
Attorney.

EXHIBIT 3

IN THE SUPERIOR COURT OF THE [redacted] FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MARK EDWIN COOK,

Defendant.

[redacted]

This cause coming on [redacted] hearing in open court on the oral motion of John R. Allen, the court-appointed attorney for Mark Edwin Cook in the above-entitled cause, asking that the Defendant, Mark Edwin Cook be delivered to the King County Hospital for purposes of a medical examination, and it appearing that an order appointing Commission of Physicians has been previously entered in this cause,

NOW, THEREFORE IT IS HEREBY ORDERED, that the defendant Mark Edwin Cook be delivered to the King County Hospital on the 7th day of March, 1958, at the hour of 9:00 A.M., for the purposes of a medical examination, and that upon completion of such examination, that the said defendant be returned to the King County Jail.

Done in Open Court this 6th day of March, 1958.

Judge

PRESENTED BY:

Attorney for Defendant

NOTICE OF PRESENTATION WAIVED:

Prosecuting Attorney for King County

Attorney for Plaintiff

EXHIBIT 4

IN THE SUPERIOR COURT OF THE [redacted] WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MARK EDWIN COOK,

Defendant.

[redacted]

THIS MATTER having [redacted] the above-entitled [redacted] oral motion of the Prosecuting Attorney for King [redacted] and through his deputy James R. Cook for an order [redacted] the payment of costs of the psychiatric examinations of Mark Edwin Cook; and it appearing that Jack J. Klein, M.D. and Ardis J. Candy, M. D. were appointed by the court for examination of said Mark Edwin Cook and that said physicians did examine the said Mark Edwin Cook; and it appearing that said physicians are engaged in the practice of medicine and entitled to a reasonable fee for their services in connection with said examinations; and that $25.00 is a reasonable sum for each physician for such services;

NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Clerk of this court pay to Jack K. Klein, M.D. and Ardis J. Candy, M.D. out of the Witness Fees, Criminal, the sum of $25.00 each.

DONE IN OPEN COURT this [redacted] day of April, 1958.

15

Judge

Presented by:

Deputy Prosecuting Attorney

Klein paid by cash #

Candy paid by cash #

EXHIBIT 5

MARK EDWIN COOK'S MEMORANDUM OPPOSING STATE'S MOTION TO DISMISS [FILED DECEMBER 27, 1985]

Magistrate Sweigert

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON

MARK EDWIN COOK, Petitioner, vs. NORM MALENG, et al., Respondents.	No. C85 - 1943D MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION OPPOSING STATE'S MOTION TO DISMISS

I. HIS COURT HAS JURISDICTION OVER THE SUBJECT MATTER BECAUSE THE PETITIONER IS "IN CUSTODY" TO SATISFY THE REQUIREMENTS OF 28 U.S.C. SEC. 2254, AND HIS PETITION SHOULD NOT BE DISMISSED FOR LACK OF CUSTODY.

Respondent's claim that petitioner is not "in custody" within the meaning of 28 U.S.C. Sec. 2254 is just not true. Petitioner is a federal prisoner who was sentenced in a Washington State case under King County Cause No. 76969 in January, 1978. See Petition, Ground Two. While in federal custody, the state placed a detainer against petitioner requesting that the government advise it when he will be released so the state can pick him up to begin serving his 1978 sentence.

The Ninth Circuit in Rose v. Morris, 619 F 2d 42(9th Cir.1980) holds that:

> ...a detainer in the form of a communication from the Washington State Board of Prison Terms and Paroles requesting that it be notified before Rose was to be released from federal custody so that it could retake Rose and require him to begin serving the balance of his sentences (C.T.69), is sufficient "custody" to allow a habeas corpus action.

619 F 2d at 44.

Further, the Rose Court citing Peyton v. Rowe, 391 US 54, 88 S Ct 1549, 20 L Ed 2d 426(1969), follows the holding:

> ...that a prisoner may challenge a future sentence that he is not yet serving. (391 US at 67)

Since that holding, the Supreme Court has emphasized that "habeas corpus relief is not limited to immediate release from illegal custody, but that the writ is available as well to attack future confinement and obtain future releases." Preiser v. Rodriguez, 411 US 475,487, 93 S Ct 1827,1835, 36 L ed 2d 439(1973). See Petitioner's Brief in Support of Petition for a Writ of Habeas Corpus at 6.

In Petitioner's Petition in this case, he presented three grounds for relief. The state argues only against the first ground. Petitioner does not concede that the state is correct in its argument but merely points out that this Court does have clear jurisdiction, at least, under the second ground.

This Court does have jurisdiction over the subject matter because the petitioner is "in custody" within the meaning of 28 U.S.C. Sec. 2254 as interpreted by the courts and this petition should not be dismissed for lack of jurisdiction.

II. PETITIONER'S PETITION SHOULD NOT BE BARRED BY THE DOCTRINE OF LACHES WHERE HIS TUCKER CLAIM WAS RAISED IN THE 1976 STATE COURT PROCEEDINGS.

Petitioner was found guilty in King County Cause No. 76969 in October, 1976. Shortly thereafter, the state filed a supplemental information alleging the defendant, this petitioner, to be an habitual criminal, relying in part upon proof of petitioner's 1958 conviction. Petitioner defended himself from the allegation by raising a Tucker Claim in regards to the 1958 conviction. In United States v. Tucker,404 US 443, 92 S Ct 509, 30 L Ed 2d 592(1972), the

Supreme Court held that invalid convictions may not be used to enhance a sentence imposed on a subsequent conviction. Also see Farrow v. United States, 580 F. 2d 1339(9th Cir.1978). After a thorough examination of the state court record on the 1958 conviction, the state conceded to petitioner's Tucker Claim and moved for dismissal of its supplemental information. The motion was granted by the state court. The state had ample opportunity to examine the record at that time and cannot logically expect something favorable to the state to have been lost between that time and the present. Further, the Court in Massachussetts v. Sheppard, ___US___, 104 S Ct 3424, 82 L Ed 2d 737(1984) holds:

> ...the determinations of a judge acting within his jurisdiction, even if erroneous, are valid and binding until they are set aside under some recognized procedure. (cites omitted)

82 L Ed 2d at 744.

Petitioner submits that the state court's order dismissing the supplemental information should have some res judicata effect on the issue of his Tucker Claim and the doctrine of laches should not apply in this case.

Further, some of the delay alluded to by the state occurred due to the inevitable delay in state court proceedings and the requirement that he exhaust his state court remedies before filing in the federal court. Such delay has been found to be excusable. Carafas v. LaVallee, 391 US 234, 88 S Ct 1556, 20 L Ed 2d 554(1968) at 559-560.

Actually, the state suffers no prejudice because it has conceded to the issue of the illegality of the 1958 conviction in the 1977 state court proceedings. Petitioner therefore submits that his petition should not be barred by

the doctrine of laches where his Tucker Claim was raised in the 1976 state court proceedings.

CONCLUSION

Petitioner's petition should not be either dismissed nor denied for lack of jurisdiction or for inexcusable delay on the part of the petitioner.

Dated: December 24, 1985.

Respectfully submitted,

MARK EDWIN COOK, petitioner pro se
Reg. No. 20025-148(K)
3901 - Klein Boulevard
Lompoc, California 93438

STATE'S RESPONSE TO MR. COOK'S MEMORANDUM OPPOSING STATE'S MOTION TO DISMISS [FILED JANUARY 8, 1986]

MAG. SWEIGERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARK EDWIN COOK Petitioner vs NORM MALENG, et al., Respondents	NO. C85-1943D RESPONSE TO PETITIONER'S MEMORANDUM OF AUTHORITIES OPPOSING THE STATE'S MOTION TO DISMISS

Petitioner Cook artfully argues that he is "in custody" for purposes of federal habeas corpus jurisdiction because he has a detainer placed upon him, while he is in federal custody, as the result of his conviction in King County Cause No. 76969. See pages 1 through 2 of Petitioner's Memorandum of Authorities in Support of Motion Opposing State's Motion to Dismiss. The respondents admit that petitioner is in custody for purposes of federal habeas corpus jurisdiction to challenge his conviction in King County Cause No. 76969. See Exhibit 1, copy of Judgment and Sentence. Further, petitioner is also in custody as the result of his conviction in King County Cause No. 42468, see Exhibit 2, because the Parole Board has suspended his parole on that cause, and part of the detainer placed upon petitioner Cook is a parole detainer.

MICHAEL P. LYNCH
Assistant Attorney General
Department of Corrections
P.O. Box 9699 FN-61
Olympia, WA 98504
(206) 754-1415

However, this changes nothing with regard to petitioner's status with regard to King County Cause No. 31530, the conviction which he is challenging in the case at bar. Petitioner's parole has not been suspended on this cause and in fact the maximum expiration date passed prior to the initiation of petitioner's suit.

Therefore, the respondents would submit to this court that petitioner does not meet the jurisdictional prerequisite of being "in custody" at the time he filed his petition challenging King County Cause No. 31530.

DATED this 27th day of January, 1986.

Respectfully submitted,

MICHAEL P. LYNCH
Assistant Attorney General

S. F. No. 9028A —05—4-67

In the County of King

Board

THE STATE OF WASHINGTON, Plaintiff,

vs.

MARK EDWIN COOK, Defendant.

No. 76969

Judgment and Sentence

The Prosecuting Attorney with the defendant MARK EDWIN COOK and counsel John H. Browne came into Court. The defendant was duly informed by the Court of the nature of the information found against him for the crime of ASSAULT IN THE FIRST DEGREE, COUNTS I AND II (WHILE ARMED WITH A DEADLY WEAPON, TO-WIT: A GUN, AS TO EACH COUNT); AIDING PRISONER TO ESCAPE, COUNT III

~~arraigned on or about the ... day of ...~~, of his arraignment and plea of "Not guilty of the offense charged in the information," of his trial and the verdict of the jury on the 1st day of October, 1976, "guilty of all three counts, with a special verdict as to Counts I and II: "Armed with a deadly weapon, and a firearm pursuant to RCW 9.95.040 and RCW 9.41.025".

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had none.

And no sufficient cause being shown or appearing to the Court, the Court renders its judgment:

That whereas the said defendant having been duly convicted by the jury in this Court of the crime of ASSAULT IN THE FIRST DEGREE, COUNTS I AND II (WHILE ARMED WITH A DEADLY WEAPON AND A FIREARM); AIDING PRISONER TO ESCAPE, COUNT III

It is therefore ORDERED, ADJUDGED and DECREED that the said defendant is guilty of the crime of ASSAULT IN THE FIRST DEGREE, COUNTS I AND II, RCW 9.11.020 (WHILE ARMED WITH A DEADLY WEAPON PURSUANT TO RCW 9.95.040 AND A FIREARM PURSUANT TO RCW 9.41.025); AIDING PRISONER TO ESCAPE, COUNT III, RCW 9.31.020

and that he be sentenced to imprisonment in such penal institution or correction facility, under the jurisdiction and supervision of the Department of Social and Health Services, Division of Institutions, as the Secretary of the Department of Social and Health Services shall deem appropriate pursuant to the provisions of RCW 72.13.120, for a maximum term of not more than Life on Counts I & II, 10 years on Count III — concurrently on I & II, III consecutive years, and a minimum term to be fixed by the Board of Prison Terms and Paroles. Ct I & II &

The defendant is hereby remanded to the custody of the Sheriff of King County to be by him detained until called for by the transportation officers of the Department of Social and Health Services, Division of Institutions, authorized to conduct him to the Washington Corrections Center.

DONE IN OPEN COURT this 6th day of January, 1978

Judge

Presented by:

Deputy Prosecuting Attorney

EXHIBIT 1

For the County of King

THE STATE OF WASHINGTON, Plaintiff,

vs.

MARK EDWIN COOK, Defendant

No. 42469

Judgment and Sentence

The Prosecuting Attorney with the defendant MARK EDWIN COOK and counsel AUGUST F. HAHN came into Court. The defendant was duly informed by the Court of the nature of the information found against him for the crime of ROBBERY, COUNTS I, II & III, Count I committed on or about the 23rd day of February, 1965; COUNT II on or about the 25th day of March, 1965 and COUNT III committed on or about the 26th day of March, 1965, of his arraignment and plea of "Not guilty of the offense charged in the information," of his trial and the verdict of the jury on the 15th day of September, 1965, "guilty of ROBBERY as charged in COUNTS I, II and III each

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had none.

And no sufficient cause being shown or appearing to the Court, the Court renders its judgment: That whereas the said defendant having been duly convicted in this Court of the crime of ROBBERY as charged in COUNTS I, II and III

It is therefore ORDERED, ADJUDGED and DECREED that the said defendant is guilty of the crime of ROBBERY as charged in COUNTS I, II and III

and that he be sentenced to imprisonment in such penal institution or correctional facility, under the jurisdiction and supervision of the Department of Institutions, as the Director of Institutions shall deem appropriate pursuant to the provisions of RCW 72.13.120, for a maximum term of not more than forty years, said sentences to run concurrently

years, and a minimum term to be fixed by the Board of Prisons Term and Paroles.

The defendant is hereby remanded to the custody of the Sheriff of King County to be by him detained until called for by the transportation officers of the Department of Institutions authorized to conduct him to the Washington Corrections Center.

DONE IN OPEN COURT this 24th day of September, 19 65.

Judge

Presented by:

Deputy Prosecuting Attorney

Certified copies of Judgment and Sentence, notice of appeal, Appearance Docket entries sent to Clerk of Supreme Court October 23, 1965

EXHIBIT 2

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
Office of Probation and Parole

ORDER OF PAROLE SUSPENSION, ARREST, AND DETENTION

TO ALL WHOM THESE PRESENTS SHALL COME,

WHEREAS, Mark Edwin Cook 027100, having been convicted of a felony and sentenced to a term of confinement and committed to the Department of Social and Health Services by the Superior Court of the State of Washington for King County, on the 24th day of September, 19 65, which sentence has not expired, and said person having thereafter been granted parole on the 14th day of September 19 71, and;

WHEREAS, it now appears that said parolee has breached a condition or conditions under which he was granted parole or has violated the law of the State, or the rules and regulations of the Board

WARRANT

NOW, THEREFORE, the undersigned Washington State Probation and Parole Officer, pursuant to the authority vested by the provisions of RCW 9.95.120 and RCW 72.04A.090, does hereby suspend the parole of said parolee and orders said parolee to be confined and detained in jail or appropriate custodial facility pending determination by the Board of Prison Terms and Paroles. The said parolee will not be released from custody on bail or personal recognizance, except on the approval of the Board of Prison Terms and Paroles and the issuance by the Board of an Order of Reinstatement of Parole on the same or modified conditions of parole.

March 12, 1976
DATE

Linda Jorgenson
WASHINGTON STATE PROBATION AND PAROLE OFFICER

COPY SERVED THIS 12th day of March 19 76

Served By: Linda Jorgenson
Position: Parole Officer

Received By: Refused to sign
Date Received: 3-12-76

DSHS 9-125 (X) (12-72)

EXHIBIT 3

No. 88-357

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

NORM MALENG, King County Prosecuting Attorney; AMOS E. REED, Secretary of the Washington State Department of Social & Health Services; KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

KENNETH O. EIKENBERRY
Attorney General
JOHN M. JONES
Assistant Attorney General
WILLIAM L. WILLIAMS
Counsel of Record
Senior Assistant Attorney General
Department of Corrections
Mail Stop: FZ-11
Olympia, WA 98504
(206) 586-1445

STATE PRINTING PLANT OLYMPIA, WASHINGTON

QUESTIONS PRESENTED

1. Does the District Court have subject matter jurisdiction over a § 2254 challenge to a state court criminal conviction when the sentence involved has expired although the conviction may have been used to enhance a subsequent unrelated state minimum term setting or in setting a subsequent federal prison term?

LIST OF PARTIES

All parties to this proceeding are listed in the case caption.

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TABLE OF AUTHORITIES

Other Authorities

No. 88-357

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1988

NORM MALENG, King County Prosecuting Attorney; AMOS E. REED, Secretary of the Washington State Department of Social & Health Services; KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Opinion filed on June 2, 1988, by the United States Court of Appeals for the Ninth Circuit, reversing and remanding for further proceedings, is found at *Cook v. Maleng*, 847 F.2d 616 (9th Cir. 1988) and appears in the Petition for Writ of Certiorari at Appendix A. The Order of the United States District Court for the Western District of Washington adopting the Magistrate's Report and Recommendation and dismissing Mr. Cook's petition for writ of habeas corpus for lack of subject matter jurisdiction appears in the Petition for Writ of Certiorari at Appendix B. The Magistrate's Report and Recommendation appears in the Petition for Writ of Certiorari at Appendix C.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on June 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Petition for Writ of Certiorari was filed with this Court on August 27, 1988. This Court granted the Writ of Certiorari on November 7, 1988.

STATUTORY PROVISION INVOLVED

The Habeas Corpus statute regarding remedies in Federal courts for petitioners in State custody, 28 U.S.C. § 2254 appears in the Petition for Writ of Certiorari at Appendix D.

STATEMENT OF THE CASE

Respondent, Mark Edwin Cook, is currently serving a thirty year federal sentence for bank robbery and conspiracy. In 1958, a jury in Washington state court convicted Mr. Cook of three counts of robbery (the 1958 crimes). He was sentenced to three concurrent twenty year terms of imprisonment and was thereafter paroled in 1962.

While on parole in 1965, Mr. Cook was again convicted in Washington state court of three counts of robbery, and sentenced to three concurrent fifty year terms (the 1965 crimes). He was then again paroled in 1973. In 1976, while on parole, Mr. Cook was convicted of the federal crimes leading to his current incarceration (the federal crimes).

Mr. Cook was also convicted in Washington State court in 1976 of two counts of first degree assault and one count of aiding a prisoner to escape (the 1976 state crimes). The Washington state court thereafter[1] sentenced Mr. Cook to two life terms and one ten year term of imprisonment. These sentences were maximum terms in Washington's then indeterminate sentencing scheme, with the minimum terms to be set by the Board of Prison Terms and Paroles.[2] Since Mr.

[1]Sentencing on Mr. Cook's 1976 state crimes did not take place until 1978 — thus his sentence is referred to in this brief as the 1978 sentence.

[2]The Board is now called the Indeterminate Sentence Review Board. RCW 9.95.009(1).

Cook had prior felony convictions, his minimum term on his 1978 state sentence was required to be set longer than would otherwise be the case.[3] Because Mr. Cook could not serve that sentence until his release from federal prison, the State of Washington has placed a detainer against him requesting federal prison authorities to notify the State when Mr. Cook's federal term expires.

In 1985 — twenty-seven years after his 1958 conviction and seven years after the expiration of his sentence thereon — Mr. Cook filed the instant federal habeas petition, pursuant to 28 U.S.C. § 2254, challenging that 1958 conviction. He alleged that his 1958 conviction was illegal because he was never given a competency hearing in 1958, and that its use to enhance both his 1976 federal sentence and 1978 state sentences therefore was also illegal.

The District Court granted the state's motion to dismiss the petition for lack of subject matter jurisdiction holding that Mr. Cook was not "in custody" on his 1958 conviction since the maximum sentence had expired prior to the filing of his petition. Mr. Cook then filed a timely notice of appeal and the circuit court issued a certificate of probable cause.

In examining Mr. Cook's petition, the circuit court found that the 1958 conviction might have lengthened his 1978 minimum term[4] by as much as seven and one-half years.[5]

[3]RCW 9.95.040(2) requires the Board to set a minimum term of at least seven and one-half years for a person previously convicted of a felony (as Mr. Cook had been in both 1958 and 1965) who was armed with a deadly weapon at the time of the commission of his offenses (as Mr. Cook was at the time of his 1976 crimes). Had he not been armed, his mandatory minimum term would be five years, based on having previously been convicted of at least one felony. RCW 9.95.040(1). In any event, RCW 9.95.040(4) gives the Board the authority to waive Mr. Cook's mandatory minimum term and parole him prior to such term's expiration. RCW 9.95.040 is set forth in the Petition for Writ of Certiorari at Appendix E.

[4]Mr. Cook has made no contention that the 1958 conviction has in any way affected his maximum term.

[5]This is an incorrect statement of Washington law. RCW 9.95.040 required Mr. Cook's minimum term to be set at five years due to his use of a deadly weapon in the course of committing the crimes for which he was sentenced in 1978. His prior felony conviction required this minimum term to be increased two and one-half years for a total of seven and one-half years. Mr. Cook would have been subject to this two and one-half year

This at most collateral consequence of the expired 1958 conviction upon the 1978 minimum term led the circuit court to find that Mr. Cook was still "in custody" on the 1958 conviction and that therefore the district court did have subject matter jurisdiction to entertain Mr. Cook's petition. Petitioners herein challenge the Ninth Circuit's holding that such a collateral consequence is enough to meet the "in custody" requirement of 28 U.S.C. §2254(a).[6]

SUMMARY OF ARGUMENT

The effect of the Ninth Circuit's opinion is to substantially undercut the notion of finality of criminal judgments and interfere with a state's ability to construct a criminal justice system which utilizes prior criminal behavior as a distinct element at criminal sentencings. To expand federal habeas jurisdiction as the Ninth Circuit has done aggravates the concerns of finality and comity which this Court has previously recognized.

The rule adopted by the Ninth Circuit enables an offender, who has embarked on a criminal career spanning more than thirty years, to now go back and challenge his early convictions in hopes of lessening his period of confinement on one or more subsequent, unrelated convictions. The state submits that this is not "substantial justice." Neither the history of the Great Writ nor this Court's prior decisions stand for such an abuse where, as here, the offender had two decades to present this issue to a federal court while still in custody, but failed to do so.

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increase regardless of the 1958 conviction because of his 1965 felony convictions.

[6]Petitioners concede that Mr. Cook may well have other remedies available. Under state law, the Washington Rules of Appellate Procedure, 16.3-16.15, allow Mr. Cook to challenge his 1958 conviction by way of a personal restraint petition. If Mr. Cook's challenge is thereafter successful, then *State v. Ammons*, 105 Wn.2d 175 (1986) guarantees Mr. Cook a new sentencing where the 1958 conviction will not be considered. Other remedies — including a writ of error coram nobis — are no doubt available in other jurisdictions. *See*, for example, *United States v. Morgan*, 346 U.S. 502 (1954) (enactment of § 2255 — a companion provision to § 2254 for persons in custody under federal court orders — did not deprive the federal trial court of jurisdiction to entertain an application for a writ of error coram nobis).

This Court's early cases construed the "in custody" requirement for habeas corpus jurisdiction to mean actual confinement or the present means of enforcing confinement. Although later cases adopted a somewhat more liberal view of the degree of restraint necessary to constitute custody, these cases followed a common line of reasoning. The habeas petitioner was under some restraint stemming directly and continuously from the conviction the petitioner sought to attack by way of federal habeas corpus. The indirect collateral consequences of Mr. Cook's 1958 conviction should not be substituted for the "custody" necessary for jurisdiction in a federal habeas proceeding.

This Court should state in explicit terms that which was implicit in *Carafas*: that is, collateral consequences of a conviction, where sentence has expired prior to filing of the petition, are no substitute for the statutory "in custody" requirement necessary for subject matter jurisdiction in a federal habeas proceeding. This Court should draw a "bright line" and resolve the split in the circuits by dismissing Mr. Cook's petition for lack of subject matter jurisdiction in this federal habeas proceeding.

ARGUMENT

1. Introduction

This case involves the scope of the federal court's jurisdiction to review state court criminal convictions under 28 U.S.C. § 2254(a):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person *in custody pursuant to the judgment of a state court* only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States. *Id.* (Emphasis added).

The question presented here is whether a person convicted of a criminal offense in state court can be considered "in custody" for § 2254(a) jurisdictional purposes after the sentence imposed for that offense has been served.

The Ninth Circuit's decision below grants § 2254 subject

matter jurisdiction to challenge an expired conviction any time that conviction is used to enhance a subsequent unrelated criminal sentence. The Ninth Circuit's holding essentially means that state court convictions can never be considered final.

Under that holding, custody on the actual conviction under attack is no longer necessary for habeas jurisdiction and the definition of custody is only limited by the extent of the petitioner's subsequent criminal career.

If the jurisdictional "custody" requirement of § 2254(a) is to be meaningful, it cannot be satisfied by indirect, collateral effects of an expired conviction upon a subsequent unrelated sentence. To hold otherwise would unduly burden the states with the obligation to relitigate criminal judgments, based upon stale claims, years after trial when records have been lost and memories dimmed by the passage of time. Such a treacherous path is not dictated by common sense or this Court's prior decisions.

The Ninth Circuit's liberal expansion of the custody requirement allows a career criminal to file a habeas petition after restraint has expired when the state has great difficulty in responding. Such "sandbagging" has consistently been condemned by this Court in other contexts.[7] It should not be encouraged in this context.

This Court should hold that "custody" exists only if it is an uninterrupted meaningful restraint stemming directly from the conviction under attack. When an offender is no longer serving a sentence, then that offender should not be considered "in custody" for federal habeas jurisdictional purposes.

This Court should reverse the Ninth Circuit decision and hold that once the sentence for a conviction has been served, the convicted felon cannot be considered "in custody" for habeas jurisdiction purposes, even though the existence of

[7] *See, Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); and *Murray v. Carrier*, ____ U.S. ____, 106 S.Ct. 2639 (1986).

that conviction is used to enhance a sentence imposed as a result of a subsequent unrelated conviction.

2. **The Jurisdictional Reach of Federal Habeas Corpus Should Not Be Expanded So As To Further Erode the Concept of Finality or to Interfere With the Establishment and Operation of State Criminal Justice Systems.**

In defining the scope of federal habeas jurisdiction, the court must consider not only the historical role of the Great Writ as "a bulwark against convictions that violate 'fundamental fairness.' " *Engle v. Isaac*, 456 U.S. 107, 126, (citation omitted). Also to be born in mind are the tremendous societal costs entailed by the broad exercise of the court's habeas jurisdiction.

One of the most traumatized victims of the expansive use of habeas jurisdiction is the notion that at some point a criminal conviction can be considered final. Justice O'Connor, in *Engle, supra*, quoted with approval this observation by Justice Harlan:

> Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community. *Sanders v. United States*, 373 U.S. 1, 24-25, (dissenting opinion).

Engle v. Isaac, 456 U.S. at 127.

The effect of such continuing re-examination of state court criminal convictions is to undercut the credibility and effectiveness of our judicial system. As Justice Powell has observed:

> No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation.

Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (concurring opinion).

The Ninth Circuit's liberal interpretation of the "in custody" requirement for federal habeas jurisdiction aggravates these very concerns. Under its ruling, a conviction never becomes final and the legitimate interest a state has in structuring a sentencing system to include consideration of prior criminal conduct may be thwarted.

Effective July 1, 1984, Washington began utilizing what is generally known as a determinate sentencing system, under its Sentencing Reform Act, RCW 9.94A. Under that statute, persons convicted of crimes committed on or after July 1, 1984, are sentenced according to a series of standard sentencing ranges. The range for a particular offense committed by a particular offender is determined by reference to a statutory matrix which takes into account the seriousness level of the offense and the prior criminal history of the offender. RCW 9.94A.310.[8]

Other states have adopted similar sentencing schemes.[9] While the wisdom of such a sentencing plan may be subject to debate as a policy matter, the federal courts' exercise of its habeas jurisdiction should not interfere with the legitimate interests states have in establishing and operating their criminal justice systems.

[8]Offenders convicted of crimes committed prior to July 1, 1984, including, for example, Mr. Cook's unserved 1978 sentence, remain subject to the jurisdiction of the Indeterminate Sentence Review Board. The Board is required to "consider the purposes, standards and sentencing ranges" of the Sentencing Reform Act when making decisions on duration of confinement and parole release. RCW 9.95.009(2). *See also, In re Myers*, 105 Wn.2d 257 (1986) and *Addelman v. Board of Prison Terms and Paroles*, 107 Wn.2d 503 (1986).

Thus, under current Washington law, the length of the prison sentence actually served by all felony offenders is directly related to those offenders' prior criminal records.

[9]*See*, California Penal Code § 1170; Delaware Code Annotated Title 11, Chapter 42; District of Columbia Court Rules 32; Florida Statutes Annotated, Chapter 921; Annotated Code of Maryland, Rule 4-342, 4-343; Annotated Laws of Massachusetts § 279; Michigan Statutes Annotated § 28; Minnesota Statutes Annotated § 244 App.; Purdon's Pennsylvania Forms § 42; General Laws of Rhode Island § 12-19; Utah Code Annotated § 77; Vermont Revised Criminal Procedure 32; Wisconsin Statutes Annotated, Chapter 973.

Justice O'Connor has written of the "special costs" which the expansive use of the habeas writ imposes on the concept of federalism:

> The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.

Engle, supra, at 129. (Citation omitted).

Yet, if the Ninth Circuit decision stands, the ability of Washington and other states to rely on prior criminal history as an element in their respective sentencing schemes will be frustrated, since the individual convictions will thereby become subject to federal habeas corpus challenge.

Such a further federal intrusion into what is clearly within the province of the states would be unwarranted. Further, the state prosecutorial authorities charged with administering the criminal justice system are faced with several practical problems if this Ninth Circuit opinion is allowed to stand. Aside from the difficulty of reconstructing the record of a 1958 conviction in order to allow the federal court to review that conviction, the prosecutor must also consider the difficulty of retrying Mr. Cook if the federal court were to grant the writ as to his 1958 conviction. Not only will witnesses and other evidence likely be difficult to locate, the practical exigencies of prosecutors' day-to-day workload dictate against committing resources for retrial of an offense for which the maximum sentence has already been served.

Even more problematical is a prosecutor's reliance on prior convictions from another state as a sentence component for the current case.[10] If, in such a situation, federal habeas jurisdiction were allowed to attach to the prior conviction, then Washington will have the burden of responding to a

[10] RCW 9.94A.360(2) authorizes the use of prior convictions from other states as criminal history for purposes of applying the sentence matrix in a current case.

habeas challenge to such out of state convictions, notwithstanding the difficult task of obtaining court records and witnesses from out of state.

Moreover, if for whatever reason that prior conviction is overturned, the current prosecutor may have a substantial interest in having that crime reprosecuted, but no ability to effectuate that interest.[11]

It is undisputed that Petitioner has another avenue of relief under *State v. Ammons*, 105 Wn.2d 175 (1986). In the type of proceeding contemplated there it is he — and not the state — who has the burden of proof. Under habeas jurisdiction, the state bears the burden, even though the state has no opportunity to initiate a habeas proceeding at a time when memories are fresh and the trail of witnesses still warm.

If a petitioner delays bringing a habeas challenge until his sentence is completely served, and habeas is therefore foreclosed to him, he will be forced to pursue his state remedy. There the one responsible for the delay — and not the state — will bear the onus caused by that delay.

The effect of the Ninth Circuit opinion is to substantially undercut the notion of finality and interfere with a state's ability to construct a criminal judicial system which utilizes prior criminal behavior as a distinct element of criminal sentencing. To implement federal habeas jurisdiction as the Ninth Circuit has done aggravates the concerns which this Court has previously recognized.

3. **The Court of Appeals' Decision in the Case at Bar Provides Career Criminals With an Incentive to Attack Their Early Criminal Convictions with False Allegations at a Time When the State May Be Unable to Refute Such Allegations Because of the Unavailability of Records and Testimony of Officials and Participants in the Trial.**

Although addressing a different factual aspect of the "in

[11] Justice O'Connor noted: "[w]hile a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." *Engle v. Isaac*, 456 U.S. at 129. Such a result is, if anything, much more likely where the maximum sentence has already been served.

custody" requirement in a federal habeas proceeding, this Court made several observations in *Peyton v. Rowe*, 391 U.S. 54 (1968), that are relevant to the case at bar.

In holding that a state prisoner was in custody to attack the legality of a consecutive sentence prior to commencement of said sentence, the *Peyton* Court explained the dangers of waiting twenty years before litigating matters involving factual issues. The lengthy period of time involved prior to litigating factual issues leads to "dimmed memories or the death of witnesses [that] is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact." *Id.*, at 62. The *Peyton* Court went on to state that "postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice." *Id.* (Footnote omitted).

The *Peyton* Court was mindful of and quoted from the circuit court's analysis of the case:

> Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the [state] may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater the lapse of time, the more unlikely it becomes that the state could prosecute if retrials are held to be necessary.
>
> It is to the great interest of the [state] and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established.

Id., at 62-63 (citation omitted).

Under the *Peyton* court's analysis, the jurisdictional "light" goes "on" immediately after the conviction, notwithstanding the intervening sentence which must be served. To hold, as the Ninth Circuit did, that jurisdiction once lost can be rekindled by subsequent events flies in the face of the *Peyton* analysis.

In the case at bar, Mr. Cook filed his petition challenging his 1958 conviction twenty-seven years after being sentenced. The circumstances are just as predicted by the *Peyton* Court.

Mr. Cook has made factual allegations and is presumably willing to give testimonial support to these allegations. The state has been unable to locate the complete state court records or the key witnesses involved. None of the attorneys for the prosecution or the defense has any recollection of a competency issue at Mr. Cook's 1958 trial. *See*, CR 10 at Affidavit of Michael P. Lynch. Thus, the state will be extremely prejudiced in its efforts to answer Mr. Cook's allegation.

The rule adopted by the Ninth Circuit enables an offender, who has embarked on a criminal career spanning more than thirty years, to now go back and challenge his early convictions in hopes of lessening his period of confinement on one or more subsequent, unrelated convictions. The State submits that this is not "substantial justice." Neither the history of the Great Writ nor this Court's prior decisions stand for such an abuse where, as here, the offender had two decades to present this issue to a federal court while still in custody and failed to do so.

4. The Indirect, Collateral Use of a Conviction Where the Sentence Has Expired, is too Attenuated to Constitute the Custody Necessary for Federal Habeas Corpus Jurisdiction.

The general nature of the habeas corpus writ from the time of its common law origin was to provide a remedy for the unlawful imprisonment of an individual. *Stone v. Powell*, 428 U.S. 465 (1976). As a direct result, the statutes governing federal habeas corpus and the rules that were enacted to enforce that procedure were consistently drafted to provide relief by way of a habeas corpus petition only to a person who is "in custody". *See*, 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254(a)(b)(d); § 2254, Rule 1(a)(1-2); § 2254, Rule 2(a) and (b).

It is apparent from the early cases that the "in custody" requirement for habeas corpus was originally construed to mean actual confinement or the present means of enforcing confinement. *Wales v. Whitney*, 114 U.S. 564 (1885).

In later cases, the courts adopted a somewhat more liberal view of the degree of restraint on personal liberty that is sufficient to satisfy the "in custody" requirement of § 2254.

While no longer requiring close physical confinement, these cases followed a common line of reasoning. The habeas petitioner was under some meaningful restraint stemming directly and continuously from the conviction the petitioner sought to attack by way of federal habeas corpus.

In *Jones v. Cunningham*, 371 U.S. 236 (1963), this court found a parolee to be under direct meaningful restraint of the conviction he sought to attack. The petitioner was restricted to a community or job at the sufferance of his parole officer. *Id.* at 242. He had to make periodic reports and refrain from certain activities. *Id.* Most importantly, any violation of the conditions of parole could result in his return to prison to serve the balance of his sentence. *Id.*

Mr. Jones was thus subject to direct restraints not shared by the public generally and those restraints stemmed directly — and without interruption — from the conviction he sought to attack by way of his federal habeas corpus petition.

Had the *Jones* court held otherwise, then custody would be like a light, switched "on" while petitioner was in custody initially and for any subsequent reincarceration for parole violation, but "off" during any intervening period he was released on parole.

Implicit in the *Jones* court's reasoning is that once the petitioner was no longer under the restraint of being on parole, he would not be "in custody". Thus, if Mr. Jones had filed his petition for federal habeas relief after being discharged from parole, then the federal courts would be without subject matter jurisdiction in a 28 U.S.C. § 2254 proceeding.[12]

Similarly, in *Hensley v. Municipal Court*, 411 U.S. 345 (1973), this court found Mr. Hensley to be under direct,

[12] Analysis similar to that of the *Jones* case has been applied to a person on probation. *Benson v. California*, 328 F.2d 159 (9th Cir. 1964) *cert. den.* 380 U.S. 951 (965).

meaningful restraint while released on bond, although the restrictions were less than those imposed upon a parolee. His movements were restricted, he was required to appear at the demand of the court, and his incarceration was imminent because his bond could be revoked at any time. *Id.* at 352.

Once again, the *Hensley* court found the petitioner under direct "restraint not shared by the public generally." But for the bond and the stay issued by the trial court and then by this Court, Mr. Hensley would have been imprisoned as a direct result of the very conviction he sought to challenge in his federal habeas petition.

While the *Hensley* decision liberally construed the amount of restraint sufficient to constitute the "custody" necessary for federal habeas jurisdiction, the restraint involved stemmed directly and continuously from the conviction Mr. Hensley sought to challenge in his federal habeas petition. Absent that direct restraint, there would have been no federal habeas jurisdiction — the jurisdictional "light" would be switched "off", only to be switched "on" again when bond was revoked, and Mr. Hensley incarcerated.

In *Carafas v. LaVallee*, 391 U.S. 234 (1968), Mr. Carafas was "in custody" at the time he filed his federal habeas petition although he was subsequently released. This Court held that his release did not deprive the federal courts of jurisdiction over Mr. Carafas' constitutional claims. It was undisputed that Mr. Carafas was "in custody" at the time he filed his petition and that the custody stemmed directly from the conviction he was challenging in his petition.

The *Carafas* court reasoned that Mr. Carafas had met his burden of filing his petition in a timely manner. The court concluded that the delay inherent in the appellate process unfairly penalized Mr. Carafas if it resulted in the subsequent dismissal of his petition for lack of jurisdiction. In addition, the collateral consequences of his conviction — he could not vote, engage in certain businesses, serve as a union official or as a juror — prevented the case from being moot. *Id.* at 237.

Thus, the *Carafas* court held that once federal habeas

jurisdiction attaches, it will not be defeated by a subsequent release from custody. Further, the collateral consequences of a conviction keep the case in controversy so as to prevent dismissal for mootness.

The *Carafas* court *did not* hold that the collateral consequences of the conviction under attack constituted the "custody" sufficient for federal habeas jurisdiction. Implicit in the court's decision is that such collateral consequences, standing alone, would not and do not rise to the level of "custody" for habeas jurisdiction purposes. Such consequences only prevent the case from becoming moot. But for Mr. Carafas' filing of his petition while he was still in custody, he would have been without a remedy in a federal habeas proceeding due to lack of jurisdiction.

In the case at bar, Mr. Cook cannot be seen as having made the required showing of being "in custody" on the 1958 conviction he seeks to challenge in this federal habeas proceeding. It is undisputed that he failed to file his federal habeas petition until seven years after the twenty year maximum sentence expired on his conviction. Thus, he is not under direct restraint of the 1958 conviction as in the *Jones* case, nor is imprisonment imminent as in the *Hensley* case.

Mr. Cook is only being affected by the 1958 conviction because of his subsequent unrelated criminal convictions. It is Mr. Cook's further criminal activity that is the cause of his present custody. His 1958 conviction was not used as an element of his subsequent crimes nor did it affect the statutory maximum sentence to which he was subjected.

There is no question that there are and will be collateral consequences of his prior convictions that will affect Mr. Cook now and in the future. Indeed, the same may be said for any person convicted of a felony crime. Under *Carafas*, the potential effect of those collateral consequences is sufficient to prevent the case from becoming moot, if jurisdiction had attached in the first place.

However, it must be remembered that this case is not about mootness. This case involves the issue of custody for § 2254 subject matter jurisdiction. Had Mr. Cook filed his peti-

tion for federal habeas relief prior to 1978, then *Carafas v. LaVallee, supra*, would govern. But the *Carafas* decision did not elevate such collateral consequences to the level required to meet the "in custody" test of § 2254.

Just as Mr. Carafas' petition would have been dismissed for lack of jurisdiction absent his filing the petition prior to his release from custody, so must Mr. Cook's petition now be dismissed for lack of jurisdiction. Collateral consequences of an expired conviction do not constitute the "custody" necessary for subject matter jurisdiction.

If Mr. Cook's petition is not dismissed, then the jurisdictional light will be "on" or "off" depending upon the occurrence of events having no relationship to the conviction itself. It will be "on" whenever the 1958 conviction has a collateral consequence on subsequent custody, but then "off" whenever Mr. Cook is released from such subsequent custody. If true "custody" is not required in federal habeas proceedings, then the finality of criminal judgements will never be achieved.

Petitioners therefore assert that the indirect collateral consequences of Mr. Cook's 1958 conviction do not constitute the "custody" necessary for jurisdiction in a federal habeas proceeding. Mr. Cook failed to file his federal habeas petition when he was "in custody" on the 1958 conviction and the federal courts no longer have subject matter jurisdiction for this 28 U.S.C. § 2254 proceeding. Petitioners therefore ask this Court to order that Mr. Cook's petition be dismissed for lack of jurisdiction.

5. **This Court Should Resolve the Split in the Circuits in Favor of the Rationale Adopted by the Fourth, Sixth and Eighth Circuits Where Petitioners Similarly Situated to Mr. Cook Have Had Their Petitions Dismissed for Lack of Subject Matter Jurisdiction.**

This Court has not yet precisely addressed a federal habeas application where the petitioner, no longer subject to a direct restraint resulting from the conviction under attack, was being affected by some collateral consequence stemming

from the challenged conviction. While the circuit courts have addressed that issue, we submit that this Court should hold that the federal courts are without subject matter jurisdiction in cases where the petitioner's sentence expired prior to the filing of his application for federal habeas relief. Such a holding would be consistent with the rationale adopted by the Fourth, Sixth and Eighth Circuit Courts of Appeal.

In *Cotton v. Mabry*, 674 F.2d 701 (8th Cir. 1982), *cert. denied*, 459 U.S. 1015 (1982), Mr. Cotton sought to challenge a 1969 conviction that had resulted in a five year sentence. Mr. Cotton had filed his federal habeas petition in 1979, at a time when he was no longer "in custody" on the 1969 conviction, because it served to prolong his two subsequent unrelated sentences.

The Eighth Circuit held in *Cotton* that the influence of the 1969 conviction on the two subsequent sentences was a collateral consequence. Relying on this Court's decision in *Carafas v. LaVallee supra*, the *Cotton* court held that such collateral consequences of a conviction only kept the case from becoming moot; they did not suffice to give the federal courts jurisdiction in a habeas proceeding. Thus, Mr. Cotton was found not to be "in custody" for purposes of federal habeas jurisdiction. *Id.* at 704.

In *Harris v. Ingram*, 683 F.2d 97 (4th Cir. 1982), Mr. Harris sought to challenge a 1978 conviction that had resulted in a twelve month jail term. Mr. Harris filed his petition for federal habeas relief, one year after his unconditional release from the 1978 sentence. Mr. Harris contended, and the Court of Appeals accepted, that the 1978 conviction enhanced his sentence and affected his eligibility for parole on a subsequent federal conviction.

The Fourth Circuit noted in *Harris* that although the statutory-requirement of custody had been met in prior cases by conditions falling short of actual present physical confinement, the custody requirement had not been eliminated, citing *Carafas v. LaVallee, supra*. The *Harris* court, also relied on *Noll v. Nebraska*, 537 F.2d 967 (8th Cir. 1976), in holding that the use of a prior conviction, the sentence for which has

expired, to enhance the sentence in a subsequent conviction does not re-establish custody on the expired conviction. Thus, the *Harris* court affirmed the district court's dismissal of Mr. Harris' petition for lack of subject matter jurisdiction. *Id.* at 99.

In *Ward v. Knoblock*, 738 F.2d 134 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), Mr. Ward sought to challenge his 1971 conviction that had resulted in a state prison term. Mr. Ward filed his petition for federal habeas relief more than eight years after he had been discharged from his state sentence. Mr. Ward alleged that his 1971 conviction caused him collateral injury in that it enhanced his custody level and adversely affected his parole eligibility on a subsequent federal conviction. *Id.* at 136.

The Sixth Circuit was not unmindful in *Ward* of this Court's gradual movement towards a more liberal construction of the "in custody" jurisdictional requirement. However, the *Ward* court held that such liberalization had not gone so far as to bring within the jurisdiction of the writ a petitioner who had fully served the sentence under attack and was no longer in custody in any meaningful sense. *Id.* at 138. Again, relying on *Carafas v. LaVallee*, *supra*, the *Ward* court held that:

> collateral consequences of [a] conviction may enable a petitioner who has fully served a sentence he wishes to chalienge to avoid being dismissed on mootness grounds, but it will not suffice to satisfy the "in custody" jurisdictional prerequisite unless, as in *Carafas* itself, federal jurisdiction has already attached.

Id. at 139. Thus, the district court's dismissal for lack of subject matter jurisdiction was affirmed. *Id.* at 140.

The Ninth Circuit relied upon *Anderson v. Smith*, 751 F.2d 96 (2nd Cir. 1984); *Harrison v. Indiana*, 597 F.2d 115 (7th Cir. 1979); *Lyons v. Brierly*, 435 F.2d 1214 (3rd Cir. 1970); and *Capetta v. Wainwright*, 406 F.2d 1238 (5th Cir. 1969), *cert. denied* 396 U.S. 846 (1969) as authority for its holding in the present case. *See*, Petition for Writ of Certiorari at A-5. These cases are distinguishable on their facts from *Cotton*, *Harris*, and *Ward*, as well as the instant case, in

that they all involved challenges to an earlier conviction made while serving a sentence consecutive to that based on the earlier conviction. On the basis that the earlier conviction affected the timing — but not the length — of the current sentence, the Second, Third, Fifth and Seventh Circuits held that petitioners were still in custody as to the earlier conviction. In such circumstances, elimination of the earlier conviction causes the time of serving the consecutive sentence to be advanced. The Ninth Circuit, in the instant case, has found custody to exist because of the enhancement effect of a prior conviction.[13]

This Court should state in explicit terms that which was implicit in *Carafas*: collateral consequences of a conviction, where sentence has expired prior to filing of the petition, are no substitute for the statutory "in custody" requirement necessary for subject matter jurisdiction in a federal habeas proceeding. This Court should draw a "bright line" and resolve the split in the circuits by dismissing Mr. Cook's petition for lack of subject matter jurisdiction in this federal habeas proceeding.

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[13] Other courts have also viewed the "in custody" jurisdictional requirement in a more liberal fashion. None of these opinions are particularly illuminating. *See*, *Jackson v. State of Louisiana*, 452 F.2d 451 (5th Cir. 1971) (custody addressed only in dicta); *Aziz v. LeFerve*, 830 F.2d 184 (11th Cir. 1987) (relied upon *Carafas* for proposition that collateral consequences establish custody); and *United States v. LaVallee*, 330 F.2d 303 (2nd Cir. 1964) (pre-*Carafas* case where subject matter jurisdiction was not contested).

CONCLUSION

For the reasons discussed above, the judgement of the Court of Appeals for the Ninth Circuit should be reversed and the matter remanded to the District Court for dismissal for lack of subject matter jurisdiction.

DATED This 16th day of December, 1988.

Respectfully submitted,

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No. 88-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORM MALENG, etc., et al.

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit**

RESPONDENT'S BRIEF ON THE MERITS

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Shall the federal courts continue to have habeas corpus jurisdiction to review the constitutional validity of a prior state court conviction which the state uses to directly enhance and lengthen a current state prison term?

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COUNTERSTATEMENT OF THE CASE

A. Course Of Proceedings.

In 1976, Respondent Mark Edwin Cook ("Mr. Cook") was convicted in King County, Washington, Superior Court of first degree assault (two counts) and aiding a prisoner to escape. J.A. 35. The State then filed a Supplemental Information seeking to enhance Mr. Cook's sentence under Washington's "habitual criminal" statute, Wash. Rev. Code ("RCW") 9.92.090. One of the two prior convictions the State proposed to use to impose habitual criminal status and enhance Mr. Cook's sentence was a 1958 conviction in King County Cause Number 31530 for three counts of robbery. This is the 1958 conviction which is at issue in the present case.

The State had to drop its efforts to impose the habitual criminal enhancement. After Mr. Cook objected to the use of the 1958 conviction (*see* J.A. 30-31), the prosecutor conceded in a sworn affidavit dated November 14, 1977:

> . . . the court file in King County Cause No. 31530 shows that on 4 March 1958 an order was signed appointing the commission of a physician to examine Mark Edwin Cook, the court finding a reasonable doubt existing as to the sanity of the defendant; subsequent court documents indicate that the defendant was in fact examined; however, no documents exist to indicate that the defendant was found competent to stand trial prior to the trial in which he was convicted; that an investigation of the Office of the King County Prosecuting Attorney shows that no order of competency was filed, no transcript of a competency hearing exists and the entries of the clerk of the court do not show that either a hearing to determine competency was held subsequent to March 4,1958 or that a finding of competency was made; that for the above facts and reasons your affiant believes that the 7 May 1958 conviction cannot

> be used for the purposes of proving the allegations in the supplemental information. . .

J.A. 10. Based on this admission that the State could not prove the validity of Mr. Cook's 1958 conviction, the trial court dismissed the Supplemental Information. J.A. 11. Sentence on the 1976 conviction was finally imposed in 1978. J.A. 35.[1]

Mr. Cook was also convicted on felony charges in federal court in 1976. J.A. 7. He was sentenced first on his federal sentence and he is currently serving his federal sentence. J.A. 8. His 1978 state sentence will be served consecutively to the federal sentence. J.A. 8. Washington has filed a detainer with the federal authorities so that the State will immediately take Mr. Cook into Washington custody upon his release from federal custody. J.A. 33.

Even though Mr. Cook was not found to be a habitual criminal, the 1958 conviction—apparently obtained without a finding of competency—has remained on Mr. Cook's record and will be used to enhance his 1978 Washington prison sentence. The specific state sentence enhancements which Mr. Cook will suffer from the 1958 conviction are discussed in § B of this factual statement, below at pp. 4-9. Mr. Cook also has alleged that the 1958 conviction is affecting the length of his federal prison term. J.A. 7.

Because of the continuing effects of the 1958 conviction, Mr. Cook filed a Personal Restraint Petition (state post-conviction petition) in the Washington Court of Appeals in about 1982 or 1983, claiming, *inter alia*, that the 1958 conviction was invalid and therefore could not be used to enhance his current sentence. In 1984, that court denied

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[1] This conviction and sentence is therefore referred to in this Brief as "1978 sentence" or "1978 conviction".

relief, and the Washington Supreme Court denied review on the merits. J.A. 12-14. In so doing, the Washington Supreme Court specifically rejected the State's jurisdictional argument under state law:

> The prosecutor maintains that Mr. Cook is not under restraint as a result of the 1958 conviction because the maximum 20-year term of imprisonment on that conviction has expired. As Mr. Cook points out, however, this position is highly questionable in light of the actual and potential consequences to him of having the conviction on his record. There appears to be sufficient existing "restraint" within the meaning of RAP 16.4(b) to warrant relief if relief is otherwise called for.

J.A. 12-13 (citations omitted).

In 1985, Mr. Cook filed a *pro se* Petition For Writ of Habeas Corpus in the United States District Court for the Western District of Washington. J.A. 3-8. Mr. Cook listed the 1958 conviction as the "conviction under attack" (J.A. 3), but also alleged, as Ground Two for relief: "My Washington State sentence under King County Cause Number 76969 [the 1978 sentence] has been unlawfully enhanced on the information of an invalid 1958 conviction". J.A. 6. Mr. Cook also claimed as grounds for relief that the 1958 conviction itself was unconstitutionally obtained, and that the same 1958 conviction was also affecting his federal sentence. J.A. 6-7. The 1958 conviction was defective, Mr. Cook alleged, because he was convicted while incompetent and without due process on the issue of competency. J.A. 6.

The State answered the petition by claiming that the district court lacked jurisdiction because the 20-year sentence on the 1958 conviction had expired, and that delay within the meaning of Rule 9(a) of the Rules Governing

§ 2254 Proceedings In The United States District Courts should prevent a hearing on the merits. J.A. 15-27. Mr. Cook replied that he was "in custody" on the 1958 conviction at least as it enhanced his 1978 state prison sentence. In response the the Rule 9(a) claim, Mr. Cook pointed out the State's 1977 concession during the "habitual criminal" proceedings that the 1958 conviction was insupportable and argued that exhaustion of State remedies had caused much of the delay since the 1978 sentencing. J.A. 29-32. In reply, the State specifically conceded that Mr. Cook is "in custody" on the 1978 state sentence (J.A. 33), the sentence which Mr. Cook alleged is being enhanced by the 1958 conviction.

The District Court held that Mr. Cook was not "in custody" and dismissed the petition. District Court rulings, attached to Cert. Petition as Appendices B and C. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding that the 1958 conviction's direct enhancement of Mr. Cook's 1978 Washington prison sentence meant that Mr. Cook was "in custody" sufficiently to allow a challenge to 1958 Washington conviction in habeas proceedings. *Cook . Maleng*, 847 F.2d 616 (9th Cir. 1988) (opinion reproduced as Appendix C to Cert. Petition).

The District Court did not reach the Rule 9(a) laches issue. There was no hearing, nor were any findings or conclusions made on that issue. Consequently, the Court of Appeals likewise did not hear or rule upon that issue. The State's Certiorari Petition requested review only of the "custody" question which was resolved by the Ninth Circuit. Cert. Petition at i; Brief Of Petitioner at i.

B. Enhancement Of The 1978 Sentence By The 1958 Conviction.

The State conceded in the District Court that Mr. Cook is "in custody" on the 1978 sentence. J.A. 33. The state has

also conceded here that Mr. Cook's 1978 sentence is directly affected by his prior convictions: "[U]nder current Washington law, the length of the prison sentence actually served by all felony offenders is directly related to those offenders' prior criminal records." States Brief at 8, n. 8. The State's concession that Mr. Cook's prior convictions will directly affect his state prison term is, we believe, sufficient for the issues here to be decided. However, to the extent that details of the specific enhancements will be useful to the Court or important to the decision in this case, and because the state does not discuss those details (State's Brief at 5, n.5; 8, n.8), they are discussed here.

When Mr. Cook is sent to state prison to serve his 1978 sentence, his actual prison sentence will be set by the indeterminate Sentence Review Board ("Board"). RCW 9.95.040, text attached as Appendix E to the Cert. Petition. When the Board performs this function, it will be required by Washington statutes to base the length of Mr. Cook's prison term directly on the 1958 conviction.

Mr. Cook's 1978 sentence was imposed under Washington's "old" sentencing system. The newer Sentencing Reform Act of 1981 ("SRA"), RCW Chapter 9.994A, which initiated a "presumptive" sentencing scheme based on offense seriousness and prior record, applies directly to felonies committed on or after July 1, 1984. However, State law also mandates that the sentencing standards and ranges of the SRA be applied to pre-SRA felony prison terms. RCW 9.95.009(2), text appearing as Appendix B to Respondent's Brief In Opposition. Mr. Cook's actual prison time will thus be set under a "hybrid" system containing elements of both the old sentencing scheme and the new SRA presumptive system. In setting Mr. Cook's prison time under the hybrid system, the

Board will be required by statute to consider the impact of the 1958 conviction on prison time in two ways.

First, pursuant in *In re Hunter*, 106 Wn.2d 495, 723 P.2d 431 (1986), the Board must consider whether any "old law" mandatory minimum prison terms exist due to the 1958 conviction. This will require application of two statutes to Mr. Cook's case.

One of these statutes is former RCW 9.41.025. Former RCW 9.41.025 requires that a defendant who is convicted of using a firearm in the commission of a felony, and who has no prior felony convictions, serve a mandatory minimum duration of confinement of five years. This statute further mandates that a second offender is to given a 7½ year mandatory term, and that a third offender be given a mandatory 15 years in prison. A copy of former RCW 9.41.025 is attached as Appendix A to Mr. Cook's Brief in Opposition To the Petition in this case.[2] Assuming that the Board applies both Mr. Cook's 1958 and 1965 state convictions under this statute,[3] the 1958 conviction at issue here will double the mandatory minimum and thus directly cause an extra 7½ years of required imprisonment.[4] This is the specific sentence enhancement Mr.

[2] Although former RCW 9.41.025 has been repealed, it still applies to Mr. Cook's case through Washington's criminal penalty "savings" statute, RCW 10.01.040.

[3] The 1976 federal conviction would not serve as a second "previous" conviction because the behavior which led to that conviction was contemporaneous with the 1976 behavior leading to the 1978 state sentence. Convictions for contemporaneous behavior cannot be used to enhance each other. *State* v. *Braithwaite*, 92 Wn.2d 624, 628-629, 600 P.2d 1260, 1262-1263 (1979).

[4] The Board will decide for itself whether the 1958 conviction is a prior felony within the meaning of the statute, and whether there is adequate proof of it. *See In re Bush*, 95 Wn.2d 551, 627 P.2d 953 (1981).

Cook alleges in his petition. J.A. 6.

The other "old law" statute which must be considered, even if former RCW 9.41.025 is not applied, is RCW 9.95.040 (text set out as Appendix E to the Cert. Petition). This statute mandates that when a felony conviction includes a finding that the defendant was armed with a deadly weapon, the Board must set the prison term at no less than five years, and if such a defendant has any prior felony conviction, the "mandatory minimum" term is raised from five to 7½ years. The Board cannot waive this term except by an extraordinary two-thirds vote. RCW 9.95.040. The 1978 sentence does include a deadly weapon finding, so when the Board gives Mr. Cook his prison term on the 1978 sentence, the 1958 conviction could be responsible for raising the mandatory minimum term from five to 7½ years.[5]

Second, the Board must consider the Sentencing Grid of the "new law," the SRA, in setting Mr. Cook's prison term. RCW 9.95.009(2). That Sentencing Grid requires increasing Mr. Cook's presumptive time in custody based directly on the number of prior felony convictions proven. If the SRA presumptive term is longer than any "old law" mandatory minimum term, or if no mandatory minimum applies, the SRA presumptive term will provide a base-

[5] As the State points out, Mr. Cook's other Washington felony conviction could cause the same result, but by the time the term is set the 1958 conviction conceivably could be the only other usable felony conviction, thereby directly causing the additional two-and-one-half-year mandatory prison term. State's Brief at 5, n.5. For example, the Board could find that proof of the 1965 conviction is inadequate, or the 1965 conviction could be vacated in other proceedings. *in re Bush*, *supra*.

line prison term which can be altered only in special circumstances.[6]

The 1958 conviction increases Mr. Cook's presumptive sentence under the SRA on his 1978 sentence by several years. Mr. Cook's 1958 conviction, a prior robbery will increase his total Offender Score by two points. This two point increase will increase Mr. Cook's presumptive prison term by about 4 years.[7]

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[6] Although Mr. Cook was sentenced under the former sentencing law, RCW 9.95.009(2) mandates that the SRA provisions be considered with regard to old-law prisoners and defendants. *In re Myers*, 105 Wn.2d 257, 714 P.2d 303 (1986); *Addleman* v. *Board of Prison Terms and Paroles*, 107 Wn.2d 503, 730 P.2d 1327 (1986). RCW 9.95.009(2) is reproduced in Appendix B to Respondent's Brief In Opposition to The Petition For Writ of Certiorari. *Addleman* holds that, even though the SRA is not technically fully retroactive, the SRA standard range is the presumptive sentence, from which departure is allowed only on adequate written reasons. One such reason is "statutory preclusion," *Addleman*, 107 Wn.2d at 511, 730 P.2d at 1332, which means that mandatory prison terms required by RCW 9.95.040 and 9.41.025 take precedence if they are *longer* than the SRA presumptive term. *See In re Hunter, supra*, 723 P.2d at 432-434.

[7] The Sentencing Grid of the SRA provides Standard Sentencing Ranges based on the seriousness level of the current offense cross-referenced with the total number and the nature of additional current offenses and prior offenses. RCW 9.94.310 and RCW 9.94.320. The seriousness level is determined by the most serious offense, Assault I in this case. RCW 9.94A.400(3). Mr. Cook's Offender Score will total either 7 or 9 points as he is given 3 points for his second current assault offense, and 2 points each for each set of prior robbery convictions; including the 1958 robberies and the 1965 robberies would total 7, or if the 1976 federal robbery is counted, the total would be 9. RCW 9.94A.310 and RCW 9.94A.330. The "seriousness level" for Assault 1 is XI. On the grid for Level XI, a change in Offender Score from 5 to 7 raises the midpoint of the presumptive term from 9 years, 9 months to 13 years, 6 months (3¼ years); a change from 7 to 9 raises the midpoint of the presumptive term from 13 years, 6 months to 17 years, 6 months (4 years). RCW 9.94.310. Relevant excerpts of these statutes are attached as Appendix C to Respondent's Brief In Opposition.

Therefore, assuming that the Board follows State law, the Board will directly enhance Mr. Cook's mandatory or presumptive prison term because of the 1958 prison term. As the State puts it, "the length of [his] prison sentence actually served" will be "directly related" to Mr. Cook's prior criminal record. State's Brief at 8, n.8. Mr. Cook's only remedy to challenge the State's use for enhancement of his 1958 conviction is through petitions for post-conviction relief. The Board determines the existence of such convictions for enhancement purposes, but does not determine constitutional validity questions. *In re Bush*, *supra*, 627 P.2d at 955.

SUMMARY OF ARGUMENT

Habeas petitioner Mark E. Cook's petition meets the "in custody" jurisdictional requirement based on three facts: (1) he is "in custody" on his 1978 Washington sentence; (2) he specifically alleged that his 1958 Washington robbery conviction was unconstitutionally obtained and would enhance the 1978 prison term; and (3) the 1958 conviction will cause lengthened imprisonment on the 1978 sentence. This is a direct claim of unconstitutional imprisonment, the core concern of federal habeas corpus jurisdiction.

Confinement in prison certainly is "custody" under even the most restrictive definition. Moreover, this Court has for many years allowed the constitutional validity of prior convictions used to enhance later sentences to be challenged, even when the effect of the prior conviction on a new sentence was not capable of quantification. In this

case, the prior conviction will cause a direct enhancement of a substantial number of years on a prison term, and the alleged constitutional defect in the prior conviction is the fundamental and long-recognized right not to be tried while incompetent.

The Ninth Circuit quite properly invoked habeas corpus jurisdiction in these circumstances, as has virtually every other circuit court which has directly faced a similar question over the past twenty years. The effect of the 1958 conviction on the 1978 prison term is not a civil penalty collateral to the issue of unconstitutional incarceration; it is a direct enhancement of sentence under a criminal judgment which is more than sufficient to invoke the strong but limited federal interest to remedy unconstitutional incarceration. The three circuit cases the State cites do not provide significant support even for a serious claim of a split in the circuits on the issue presented, let alone strong authority for the State's claim that there is no "custody".

The State's concession of custody on the 1978 sentence and the 1958 conviction's lengthening effect on the new prison term leave at most a technical problem with the Ninth Circuit's decision in this case. The Ninth Circuit held there was "custody" on the 1958 conviction due to its enhancing effect on a current sentence. Other circuits have held that the "custody" in such cases is on the current "enhanced" sentence. There is no practical difference in these two approaches in the present case: Mr. Cook's petition challenged both the 1958 Washington conviction directly and the 1978 Washington sentence as it was enhanced by the 1958 conviction. No matter how it is labelled, Mr. Cook's challenge will be brought in the same court on the same proof. Given that it is in the nature of habeas corpus to cut through form to reach substance,

this Court should hold that Mr. Cook has adequately pled the case and remand for further proceedings.

The State exaggerates the effects that affirmance of the Ninth Circuit's decision would have. Federal courts have a limited role, coextensive with the Constitution, in reviewing state sentencing systems and the decisions those systems generate. Habeas corpus review of prior convictions used to enhance present sentences is a very limited, proper remedy tailored to enforce only legitimate federal interests. The states remain free to design any sentencing system they choose so long as minimum constitutional standards are followed.

The State's asserted concerns about finality and delay are insufficient to justify altering federal habeas review of allegedly unconstitutional prior convictions which actually lengthen imprisonment. Moreover, the State's decision to resurrect the 1958 conviction for enhancement of the 1978 sentence is the source of the lack of finality here, and Mr. Cook may be hampered in his ability to prove his claim precisely because the State's use of the 1958 conviction for enhancement comes so long after the conviction itself. Given the State's choice to employ the prior conviction, the State's legitimate interests are not seriously impacted. No reasonable justification is offered for the State's proposed radical change in well-accepted habeas corpus review of prior convictions which enhance current sentences.

ARGUMENT

I. BECAUSE MR. COOK'S 1958 WASHINGTON CONVICTION DIRECTLY ENHANCES HIS NEW WASHINGTON PRISON SENTENCE, THERE IS FEDERAL HABEAS CORPUS JURISDICTION TO REVIEW THE CONSTITUTIONAL VALIDITY OF THE 1958 CONVICTION.

A. The Actual Incarceration Imposed By The 1958 Conviction—In The Form Of An Enhanced Prison Term On The 1978 Sentence On Which Mr. Cook Is Indisputably In Custody—Is More Than Sufficient To Confer Federal Habeas Corpus Jurisdiction.

1. Restraints From Prior Convictions On Present Prison Terms Impose "Custody".

Federal habeas corpus jurisdiction over state court convictions is limited to petitions "in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution . . . of the United States". 28 U.S.C. § 2254(a) (pertinent part). *See* also 20 U.S. § 2241(c): "The writ of habeas corpus shall not extend to a prisoner unless— . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ." (pertinent part). Respondent Mark Edwin Cook is in custody on his 1978 sentence imposed by a state court, and he has alleged that that custody violates the Constitution, as is shown below. Therefore, there is jurisdiction under § 2254.

Three critical facts demonstrate that the statutory criteria are met: (1) Mr. Cook's 1958 Washington conviction will directly affect the length of the prison term on his 1978 Washington sentence; (2) Mr. Cook is "in custody" on the 1978 sentence; and (3) Mr. Cook alleged in his habeas petition that the 1958 conviction was unconstitutionally obtained and would enhance the 1978 sentence. As to enhancement, the State specifically concedes that "under

current Washington law, the length of the prison sentence actually served by all felony offenders is *directly* related to those offenders' prior criminal records." State's Brief at 8, n.8 (emphasis added).[8] Regarding habeas corpus "custody" on the 1978 sentence, the State specifically conceded this point in the District Court. J.A. 33.[9] Regarding clear allegations, Mr. Cook specifically alleged both the unconstitutionality of the 1958 conviction and its enhancement of the 1978 sentence. J.A. 6-7.

These facts, in light of two lines or reasoning which have long been accepted by this Court, demonstrate habeas corpus jurisdiction to challenge the 1958 conviction.

The first relevant line of reasoning involves the meaning of the word "custody" in 28 U.S.C. §§ 2241 (c)(3) and 2254(a). This Court determines whether a habeas petitioner is "in custody" under these statutes by analyzing the severity of restraints imposed by the judgment under attack. *Jones* v. *Cunningham*, 371 U.S. 236, 240-243 (1963); *Hensley* v. *Municipal Court, 411 U.S. 345, 351 (1973); Lehman* v. *Lycoming County Children's Services*, 458 U.S. 502, 508-510 (1982); *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294 (1984). *See* specifically, 466 U.S. 300-301, and 338-340 (O'Connor, J. dissenting). Actual incarceration pursuant to a criminal judgment

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[8] The 1958 Conviction will enhance the prison term on the 1978 sentence in at least one of three ways. *See* Counterstatement Of The Case, above at pp. 4-9.

[9] Mr. Cook is currently serving a federal prison term, and the 1978 state conviction will be served consecutively. J.A. 8. The State has placed a detainer with the federal authorities to enforce the 1978 state sentence. J.A. 33. Under *Peyton* v. *Rowe*, 391 U.S. 54 (1968) and *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), this combination of circumstances constitutes present "custody" for federal habeas corpus purposes.

has, of course, always amounted to "custody". *Lehman*, *supra* at 508-510.

Indeed, it is the fact of "custody" under a state judgment which justifies federal habeas relitigation of state determinations of federal constitutional questions in the first place:

> "Custody" is the touchstone relied on by § 2254; of all the possible unconstitutional infringements on personal freedom, only unlawful "custody" has been identified as providing a sufficient basis for federal intervention.

Lydon, *supra*, 466 U.S. 340 (O'Connor, J. dissenting). *Accord*, *Lehman*, *supra*, 458 U.S. at 512-513. And, of all the possible forms of unconstitutional "custody" which could justify federal intervention, incarceration in prison provides the strongest justification. *Id.* at 508-510.

Mr. Cook's 1958 conviction is the direct and only cause of at least 3¾ years of presumptive prison time on the 1978 sentence. Counterstatement Of The Case above, at pp. 4-7. If the 1958 conviction did not exist, neither would those presumptive years in prison which have yet to be served. The 1958 conviction thus causes imprisonment, the greatest restraint the state can impose other than capital punishment. This restraint is obviously far greater than other restraints which this Court has held to constitute "custody" under §§ 2241 and 2254. *See*, e.g., *Jones* v. *Cunningham*, *supra* (parole); *Hensley* v. *Municipal Court*, *supra* (personal recognizance, at least where a stay was necessary to prevent immediate imprisonment). It is also surely severe enough to warrant federal intervention:

> . . . [T]he basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom.

Johnson v. *Avery*, 393 U.S. 483, 485 (1969). *Accord*, with historical references, *Harris* v. *Nelson*, 394 U.S. 286, 290-292 (1969); *Preiser* v. *Rodriguez*, 411 U.S. 475, 484-488 (1973).

The second relevant line of reasoning and authority prohibits the use of constitutionally infirm prior convictions to enhance sentence on a later conviction. *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967) (uncounseled convictions at state recidivist jury trial); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972) (general consideration at sentencing of uncounseled prior convictions). *See also Johnson* v. *Mississippi*, 486 U.S. ___, 100 L.Ed. 2d 575, 108 S.Ct. 1981 (1988) (state may not base death penalty aggravating circumstance on prior conviction later held unconstitutional); *United States* v. *Morgan*, 346 U.S. 502 (1954) (federal court could entertain *coram nobis* petition seeking to vacate federal conviction on which sentence had expired, but which was being used to enhance subsequent state sentence).

The use of constitutionally invalid prior convictions to enhance a current sentence causes a present violation of constitutional rights in two related ways: It denies due process by allowing sentencing based on "materially inaccurate" information (*Johnson* v. *Mississippi*, 100 L.Ed.2d at 587, 108 S.Ct. at 1989), i.e., "misinformation of constitutional magnitude," (*Tucker*, 404 U.S. at 447). *See also Townsend* v. *Burke*, 334 U.S. 736 (1948). It also forces the defendant to ' suffer[] anew from the deprivation . . ." of constitutional rights occurring at the first conviction. *Burgett*, *supra*, 389 U.S. at 115. *Accord*, *Tucker*, *supra*, 400 U.S. at 448 (the issue is whether the sentence in the current case "might have been different if the sentencing judge had known" of the constitutional infirmities).

It is a misnomer in light of these decisions to label Mr. Cook's 1958 conviction "expired" when it is used to enhance a present term. Such a conviction is not "expired," it is resurrected for active use by the state, and any constitutional infirmities are resurrected with it. The *sentence* on the conviction may have expired and therefore be unreachable in habeas proceedings. *See North Carolina* v. *Rice*, 404 U.S. 244 (1971); *Lane* v. *Williams*, 455 U.S. 624 (1982). But the fact that Mr. Cook's "liberty or freedom is not in any way curtailed by a [sentence] that has expired . . .", *Lane* at 631, does not mean that the conviction itself is not curtailing his liberty. It is, in the form of several more years in prison on the 1978 sentence. Mr. Cook's attack is on the conviction which haunts him, not the sentence which does not.

These two lines of accepted doctrine, separately and together, demonstrate the existence of habeas corpus "custody" in this case. A state conviction on which the original sentence has technically expired is subject to federal review precisely when, and precisely because, it is resurrected to cause present imprisonment:

> . . .[P]etitioners who have been released after serving sentences and suffer none of the legal restraints associated with parole are generally denied the benefit of the writ. The collateral consequences they suffer may be burdensome, even debilitating, but in the Court's eyes they do not justify extraordinary relief. *Only when it is claimed that prior convictions were used to convict the petitioner of a new offense or to enhance terms now being served does the balance tip back in favor of federal intervention. . .*

Yackle, *Post-Conviction Remedies* (1981) § 43, p. 187 (emphasis added; citations omitted). *Accord*, "Developments In The Law: Federal Habeas Corpus," 83 HARV. L. REV. 1038, 1081 (1970) (If a "prior" or "ancillary" conviction is "unlawful, to the extent that the petitioner's custodial status [on a newer conviction] is affected adversely thereby, he is unlawfully in custody") (footnotes omitted). Simply put, all allegedly unconstitutionally conditions which cause or lengthen a prison sentence are properly subject to habeas corpus review. *See, e.g., Ex parte Hull*, 312 U.S. 546 (1941) (permitting habeas attack on conviction because it was the basis for a parole revocation on another sentence); *Jago* v. *Van Curen*, 454 U.S. 14 (1981) (habeas challenge to parole procedures on due process grounds); *Preiser* v. *Rodriguez*, *supra*, 411 U.S. at 487 (challenge to prison system's good conduct credit procedure must be brought by habeas corpus).

Jones v. *Cunningham*, *supra*, is an example of the general acceptance of these principles. In *Jones*, the Court decided the issue whether the petitioner was in custody on his newest conviction while on parole. But the substantive claim he made was that an old conviction—on which sentence had apparently expired—enhanced the new sentence. 371 U.S. at 237. No question was raised regarding the propriety of this challenge, and for good reason. The federal interest rises precisely with the actual physical restraint imposed, and rises to virtually its highest level when that restraint equals an increase in actual incarceration.

Moreover, the need for federal intervention if Mr. Cook can prove his claim is even greater than it was in many of the prior cases in this Court. The question here is not whether a sentence *might* have been different if the constitutional infirmities are cured—as in *Townsend*, 334 U.S. at 741; and *Tucker*, 404 U.S. at 448. Rather, there is no doubt that if Mr. Cook proves his claim his prison term on the 1978 sentence *will* be directly affected, because that term is directly related to the number of prior convic-

tions by operation of mandatory provisions of state law. Given the long-recognized fundamental defect Mr. Cook claims in the 1958 conviction, the case for limited federal intervention to assure that his 1978 sentence is constitutional could not be stronger.[10]

The federal circuits follow these principles. Ten circuits have decided relevant reported cases. The seven which have made clear rulings on the question presented here all hold that if a prior conviction on which sentence has expired enhances or prolongs a current sentence, there is federal habeas jurisdiction. *Anderson* v. *Smith*, 751 F.2d 96, 98 (2nd Cir. 1984); *Lyons* v. *Brierly*, 435 F.2d 1214 (3rd Cir. 1970); *Tucker* v. *Peyton*, 357 F.2d 115 (4th Cir. 1966); *Young* v. *Lynaugh*, 821 F.2d 1133 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 503, 1040 (1988); *Harrison* v. *Indiana*, 597 F.2d 115, 116-117 (7th Cir. 1979); *Cook* v. *Mal-*

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[10] Mr. Cook claims incompetence to stand trial. As then Chief Justice Burger wrote for a unanimous Court:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Thus, Blackstone wrote that one who became "mad" after the commission of an offense should not be arraigned for it "because he is not able to plead to it with that advice and caution that he ought." Similarly, if he became "mad" after pleading, he should not be tried, "for how can he make his defense?" 4 W. Blackstone, Commentaries *24. *See Youtsey* v. *United States*, 97 F. 937, 940-946 (CA6 1899). Some have viewed the common-law prohibition "as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom is in reality afforded no opportunity to defend himself." Foote, A Comment on Pre-Trial Commitment of Criminal Defendants, 108 U. Pa. L. Rev. 832, 834 (1960). *See Thomas* v. *Cunningham*, 313 F.2d 934, 938 (CA4 1963). For our purposes, it suffices to note that the prohibition is fundamental to an adversary system of justice. See generally Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 455, 457-459 (1967). . .

Drope v. *Missouri*, 420 U.S. 162, 171-172 (1975)

eng, *supra* (present case); *Aziz* v. *Leferve*, 830 F.2d 184, 186 (11th Cir. 1987). The Eighth Circuit has strongly implied the existence of habeas jurisdiction in such a case, although only in the district court having jurisdiction over the enhanced sentence (*Noll* v. *Nebraska*, 537 F.2d 967 (8th Cir. 1976), and has for many years allowed § 2254 challenges to prior convictions that enhance current sentences without discussion of the jurisdictional issues (e.g., *Losieau* v. *Sigler*, 406 F.2d 795 (8th Cir. 1969)). *But see Cotton* v. *Mabry*, 674 F.2d 701, 703-704 (8th Cir. 1982), *cert. denied*, 459 U.S. 1015 (1982), discussed at pp. 22-23 below. The two remaining circuits have allowed challenges of this type without discussion of the "custody" issue. *Arnold* v. *Marshall*, 657 F.2d 83 (6th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982) (by implication: jurisdiction was unquestioned; dismissal of petition affirmed on other grounds); *Smith* v. *Crouse*, 413 F.2d 979 (11th Cir. 1969) (affirming district court opinion, 298 F. Supp. 1029 (D. Kan. 1968), demonstrating apparent expiration of prior sentence).

The Ninth Circuit's narrow holding in the present case was fully consistent with all of these principles and decisions.

> We do not hold that jurisdiction afforded by § 2254(a) extends to all constitutional challenges to prior convictions upon a showing of some unfavorable collateral consequence flowing from the challenged conviction. The question presented for our decision is a narrow one, namely, whether the custody requirement for habeas corpus relief is satisfied where a prisoner's prior conviction, although expired, is used to enhance the sentence on a current or future term. We conclude the custody requirement is satisfied in such a case. Where the State uses a prior conviction to enhance a present or future sentence, fairness requires that such restraints on individual liberty be

justified. See *Hensley* v. *Municipal court*, 411 U.S. 345, 350-51, 93 S.Ct. 1571, 1574, 36 F.Ed.2d 294 (1973).

Cook v. *Maleng*, *supra*, 847 F.2d at 619. That holding was correct.

2. The State's Jurisdictional Arguments Fail To Show How Incarceration Is Not "Custody".

The State in its Brief simply ignores the massive foundation for the Ninth Circuit's holding which has been detailed above. Instead, the state offers only three circuit opinions, of which two are irrelevant and the third is neither clear nor persuasive authority, and an incorrect reading of one of this Court's cases.

The State's claim that the Fourth Circuit does not allow habeas challenges to so-called "expired" convictions which enhance current sentences incorrect. The Fourth Circuit has for many years permitted habeas petitioners to challenge "expired" convictions which lengthen current prison terms. E.g., *Tucker* v. *Peyton*, *supra*, 367 F.2d 116-119; *Strader* v. *Troy*, 571 F.2d 1263 (4th Cir. 1978). These cases remain the law of the Fourth Circuit.

The Fourth Circuit case the State cites, *Harris* v. *Ingram*, 683 F.2d 97 (4th Cir. 1982), does not deny habeas jurisdiction regarding old convictions that enhance current sentences. Rather, *Harris* holds that a habeas petitioner who was in federal custody elsewhere could not challenge a Virginia conviction on which sentence had expired directly in a habeas petition filed in U.S. District Court in Virginia because there was no continuing Virginia custody. The *Harris* opinion did not hold there was no jurisdiction to challenge the enhanced sentence, only that the challenge should be raised in the forum having

jurisdiction over the federal sentence which was allegedly enhanced by the old Virginia conviction:

> While it may even be true, as Harris argues, that his Virginia conviction enhanced the federal sentence that he is currently serving and that the conviction affects his eligibility for parole, this, however, is a challenge to federal custody, which may only be made, if at all, in an appropriate proceeding such as one under 28 USC § 2255. See *United States* v. *Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *Nelson* v. *George*, 399 U.S 224, 228 n.5, 90 S.Ct. 1963, 1966 n.5, 26 L.E.2d 578 (1970); *Strader* v. *Troy*, 571 F.2d 1263 (4th Cir. 1978).

683 F.2d at 98-99 (footnote omitted here, which makes it clear that the court is not addressing the merits of a petition "filed in the appropriate court"). *Harris* thus holds not that habeas relief is precluded, just that the petition was filed in the wrong court.

This is made certain by the *Harris* court's citation to *Strader* v. *Troy*, *supra*. In *Strader*, the Fourth Circuit transferred a habeas petition from federal district court in Virginia to federal district court in North Carolina because it was a North Carolina sentence with was allegedly enhanced by an "expired" Virginia conviction. Again, the question was not whether the old enhancing conviction could be challenged, but where.

Mr. Cook's case presents no such inter-jurisdictional problems: Both the enhancing and the enhanced convictions are Washington State convictions. Given the lack of a venue issue, the Fourth Circuit would allow Mr. Cook's challenge to the 1958 Washington conviction because it enhances his current sentence from the same state.

The Sixth Circuit case cited by the State does not support its position either. *Ward* v. *Knoblock*, 738 F.2d

134 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), just like *Harris* v. *Ingram*, involves the question of *where* a challenge to a new sentence enhanced by an old conviction must be brought, not *whether* the enhancing conviction can be challenged. *Ward*, like *Harris*, involved inter-jurisdictional venue questions, and held only that where the only present custody was federal, an old Michigan conviction allegedly affecting federal custody could not be challenged in a habeas action against the State of Michigan, but must proceed under 28 U.S.C. § 2255: "Petitioner's arguments regarding the conditions of his present custody arising from his past wrongs should be decided by a court having subject matter jurisdiction over his present custody". 738 F.2d at 138.

The Eighth Circuit, the last relied upon by the State, also fails to provide persuasive authority for the State's position. The Eighth Circuit has allowed habeas petitions challenging "expired" convictions which enhance new terms. *Losieau* v. *Sigler*, 406 F.2d 795 (1969). Moreover, the Eighth Circuit has strongly implied, in an inter-jurisdictional case just like *Harris* v. *Ingram* and *Ward* v. *Knoblock*, that there would be habeas jurisdiction in the district where the new sentence enhanced by the prior, "expired" conviction was imposed. *Noll* v. *Nebraska*, 437 F.2d 967 (1976). The State's proposed authority, *Cotton* v. *Mabry, supra*, may suggest otherwise, but not clearly so: The *Cotton* opinion says that an "influence which the [prior] five year sentence *may have had* on the subsequent sentences is a collateral consequence and does not give this court jurisdiction to grant habeas relief". 674 F.2d at 703 (emphasis added). The *Cotton* court does not refer to the other Eighth Circuit cases allowing habeas challenges where a direct enhancement is alleged, and so the court apparently found that the alleged "influence" of the old

conviction was not direct or specific enough to allow a challenge. Moreover, even if the *Cotton* court did intend to preclude habeas challenges to older enhancing convictions, it stands without significant support, even in the Eighth Circuit, and lacks a serious or correct analysis of the issue.[11]

The State's claim of a split in the circuits on the issue presented is thus greatly exaggerated. One ambiguous Circuit holding based on highly questionable reasoning does not equal a serious split of authority. The Ninth Circuit decision in this case did nothing to expand habeas jurisdiction, it merely followed the correct reasoning in virtually all prior circuit opinions. This Court should reject the State's attempts to impose a radical change in this well-accepted and well-reasoned circuit practice.

The State also tries to claim that the present consequences of the 1958 conviction are merely "collateral" as that term is used in *Carafas* v. *LaVallee*, 391 U.S. 234 (1968), and therefore are not sufficient to confer custody. However, the State's argument is fatally flawed in two

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[11] The *Cotton* result is based only on *Harvey* v. *South Dakota*, 526 F.2d 840 (8th Cir. 1976), *cert. denied*, 426 U.S. 911 (1976), a case in which an expired conviction was attacked when there was *no* present or future custody of any type pending. Not surprisingly, *Harvey* held there was no "custody". The *Cotton* opinion totally fails, however, to discuss any of the authority holding that direct enhancements from old sentences do constitute "custody". *See also Grice* v. *Mattox*, 797 F.2d 686 (8th Cir. 1986). *Grice* was decided on the interjurisdictional ground that the petitioner was only in Texas custody and therefore could not file a federal habeas petition in Missouri challenging an old Missouri conviction which enhanced his Texas sentence. *Cotton* was cited for the proposition there was no Missouri custody, but the *Grice* court also pointedly noted that "[t]here is much precedent" against the "custody" holding of *Cotton*. *Id.* at 687, n.2

respects. First, the consequences of the 1958 conviction are not merely "collateral" within the meaning of *Carafas*. In *Carafas*, the kinds of collateral consequences found sufficient to defeat a mootness claim included only civil consequences, i.e., disqualification from voting, engaging in certain businesses, serving as a union official or juror. 391 U.S. at 237. But Carafas suffered no extra present incarceration as a direct result of the conviction at issue there. By contrast, Mr. Cook's 1958 conviction in the present case is the sole cause of additional imprisonment under a criminal judgment, thus invoking the heart of the type of physical "custody" which does justify federal habeas intervention.

Second, it is beside the point to claim, as does the State, that Mr. Cook is in prison now because of his new criminal behavior, rather than the 1958 conviction. It is true that Mr. Cook *has* a prison sentence because of that new conviction, but the *length* of the sentence could not be what it is without the 1958 conviction. Therefore, the 1958 conviction—the cause of the allegedly unconstitutional length of sentence—can be questioned in habeas proceedings as well. *See* pp. 12-18, of this Brief, above.

The State's "light off" argument (State's Brief at 16) also ignores the crucial reality that the 1958 conviction causes extra incarceration. The State causes habeas jurisdiction whenever it imposes new incarceration. *See*, e.g., *Tinder* v. *Paula*, 725 F.2d 801, 805 (1st Cir. 1984) (mere continuing liability for restitution after expiration of probation is not "custody," but if under state law "probation is extended or revoked," custody would be rekindled). In such cases, as in the present case, the State controls whether there will be extra incarceration, and therefore whether habeas corpus "custody" will exist. "Custody"

exists as long as, and every time that, the convicted person is in prison.

The logical and fundamentally fair "bright line" to draw is at the point of incarceration. This Court should reject the State's suggestion that no matter how directly and severely an old conviction enhances a new sentence, there can be no "custody" after the original sentence has expired. The standard "severity of restraint" analysis, which leads directly to a holding of "custody" in this case, should be retained.

B. The State's Jurisdictional Claim Amounts To A Technical, Purely Formal Complaint That Mr. Cook Should Have Presented His Challenge To The 1958 Conviction Only Under The Rubric Of A Challenge To The 1978 Sentence.

The State does not directly claim, nor could it claim, that Mr. Cook cannot challenge in habeas corpus proceedings the constitutional validity of his 1978 Washington sentence. The State has conceded that Mr. Cook is in "custody" on the 1978 sentence. An allegedly unconstitutional prior conviction used to lengthen such a sentence undoubtedly can be collaterally questioned in habeas corpus proceedings. *See* Argument § I.A. of this Brief, immediately above. This is the allegation of Ground Two of Mr. Cook's petition. J.A. 6. Therefore, the "dismissal" the State hopes to gain in this case could, at most, be a dismissal without prejudice to cure a formal pleading defect.

There is a technical debate among the circuits concerning one question: Must a habeas challenge to a prior conviction on which sentence has expired but which is used to enhance a present term be brought in the context of a petition challenging the present sentence, or can the

challenge be brought directly to the old conviction? *See* discussion in *Noll* v. *Nebraska*, *supra*, 537 F.2d at 968-969. *See also* Yackle, *Post-Conviction Remedies*, *supra* (with 1988 Supplement), § 43, p. 187 n. 72 and accompanying text (discussing the debate on this venue issue). These cases have arisen when there are problems of old convictions from one state enhancing new sentences in another state, a situation not presented in the present case. E.g., *Strader* v. *Troy*, *supra*, 571 F.2d at 1265-1266.

This technical debate, at least in the context of the present case, is an argument on mere form, and has no substantive importance. Mr. Cook listed the 1958 conviction as the subject of his petition (J.A. 3), but he has pled his case in the alternative: Ground One challenges the 1958 conviction directly; Ground Two challenges the 1978 sentence as it is enhanced by the 1958 conviction. There is no venue problem: all convictions occurred in the Western District of Washington, and no matter how the habeas petition grounds are labeled, the petition must be filed there. Moreover, whether the challenge to the 1958 conviction is made directly or in the context of the 1978 sentence, only Washington records and witnesses will be involved, and the issues, proof and proceedings will be exactly the same.

At most, then, Mr. Cook's *pro se* habeas petition contains a mere technical defect because it lists the 1958 conviction as the "conviction under attack" and in Ground One it mounts a direct challenge to the 1958 conviction.[12] Habeas corpus, however, is not a formalistic remedy, "but

[12] Another possible technical defect is in Ground Three, regarding the effect of the 1958 Washington conviction on Mr. Cook's federal sentence. Mr. Cook may have to bring such a challenge in the sentencing court under 28 U.S.C. § 2255. *See* e.g., *Harris* v. *Ingram*, *supra*, 683 F.2d at 98-99.

one which must retain the 'ability to cut through barriers of form and procedural mazes'", *Hensley* v. *Municipal Court*, *supra*, 411 U.S. at 350, quoting *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969). The Fifth Circuit has properly rejected an argument just like the State's technical claim here, and held that as long as there is a "positive and demonstrable" relationship between the old conviction and the new sentence, "The greensward of § 2254(a) . . . reveals no such hypertechnical pitfall". *Young* v. *Lynaugh*, *supra*, 821 F.2d at 1137. Given that there is no practical difference between Mr. Cook's challenges in Ground One and Ground Two, and that Ground Two is sufficient by itself to invoke habeas jurisdiction, this Court should simply affirm the Ninth Circuit's holding and direct that the case proceed under Ground Two.

Alternatively, even if this Court were to determine that the formal distinction is of significance, Mr. Cook's case obviously should not be dismissed without any remedy made available to him. Rather, this Court should construe Mr. Cook's *pro se* pleading liberally and hold that he can simply amend his pleadings in the district court and proceed under the rubric of the 1978 conviction. *See Haines* v. *Kerner*, 404 U.S. 519 (1972). Finally, even if the Court feels dismissal is necessary, such dismissal should be without prejudice to submit an amended pleading labeling the petition as only a challenge to the 1978 sentence.[13]

[13] The State may also be obliquely raising another highly technical claim, i.e., that Mr. Cook should wait for his 1978 state sentence to commence to see exactly how the 1958 conviction affects his prison term when Washington authorities set it; this may explain the State's use of the words "may have been used to enhance" in its Statement of the Question Presented. However, waiting would be unnecessary and nonsensical. Under state law, the Indeterminate Sentence Review Board must directly consider and apply the 1958 conviction to deter-

C. Given That The State Has Chosen To Resurrect The 1958 Conviction For The Sole Purpose Of Giving Mr. Cook More Time In Prison On The 1978 Conviction, The Limited Federal Interest In The Fundamental Constitutional Reliability Of The Enhancing Conviction Does Not Impede The Legitimate Ends Of The State's Sentencing System.

The State claims that the Ninth Circuit decision in this case would expand habeas jurisdiction and "further erode" the concept of finality and that it "interfere[s] with the operation of state criminal justice systems". State's Brief at 7 (heading to Argument 3). These claims are unfounded. The Ninth Circuit decision does not expand habeas jurisdiction, as is shown above. Moreover, as is shown here, the Ninth Circuit's decision—which represents a continuation of limited federal habeas review of unconstitutional prior convictions used to add incarceration on present sentences—invades no legitimate state province.

1. The Federal Interest Is Limited And Does No Harm To Legitimate State Interests.

Federal habeas review of unconstitutional prior convictions used directly to give prisoners more time in prison

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mine the prison term. *See* Counterstatement Of The Case at pp. 4-9, above. Therefore, it is positively known that the 1958 conviction will have a direct effect on that term. Given this, there is no reason to wait: As this Court emphasized in *Peyton* v. *Rowe*, *supra*, such delays until future sentences commence are detrimental to the fact-finding process in habeas proceedings. 391 U.S. at 62-64. If Mr. Cook is required to wait longer this will only add to the problems both Mr. Cook and the State already are experiencing in marshalling evidence. Moreover, the Washington Supreme Court has already heard Mr. Cook's collateral challenge to the 1958 conviction. J.A. 12-14. Waiting, if it is being advocated, should be strongly rejected.

strikes an appropriate balance between the limited federal interest in the constitutional reliability of prison sentences and the broad state interest in fashioning a sentencing system in any way that does not contravene the Constitution. The State is free to establish a sentencing system relying heavily on prior convictions, but the federal courts do have a legitimate, limited federal interest—indeed a duty—to inquire into incarceration which allegedly violates the Constitution. 28 U.S.C. § 2254. This duty is coextensive with the "custody" limitation on federal habeas jurisdiction, and it goes no further than inquiry into whether prior convictions used to add prison time meet minimum constitutional standards: When counsel has been provided, guilty pleas have been voluntary. convicted persons have been competent to stand trial, confessions have not be coerced, etc., the State is free to employ prior convictions for any rational purpose without fear of federal intervention. Once such minimum standards are met, the federal interest and duty ends, and the State retains plenary control of its criminal sentencing system. *Compare Spencer* v. *Texas*, 385 U.S. 554 (1967) (state may use prior convictions to enhance sentence) *with Burgett* v. *Texas*, 389 U.S. 109 (1967) (prior convictions used in this system must not be constitutionally infirm).

Washington and the other jurisdictions adopting sentencing systems relying directly upon prior convictions certainly knew, based on many decisions of this Court and the circuits, that the constitutional validity of some of those convictions might be questioned. *See*, e.g., United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (1988 Revised Edition), p. 207 ("Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history

score"). The Washington courts accept this principle but have chosen a different remedial avenue: Washington holds that the constitutionality of prior convictions should be determined on collateral review with the burden of proof on the petitioner. *In re Bush*, *supra*, 627 P.2d at 955-956 (validity of prior convictions used to enhance under former RCW 9.41.025 and RCW 9.95.040 can be determined on collateral attack); *State* v. *Ammons*, 105 Wn.2d 175, 713 P.2d 719, 727 (1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 398 (1987) (collateral attack is proper avenue of relief under the new Sentencing Reform Act for all but facially invalid convictions). Therefore, the Washington courts have chosen to refer defendants to their collateral remedies, and the Washington courts recognize and accept the consequences:

> A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

Ammons, *supra*, 713 P.2d at 727. *See also Toliver* v. *Olsen*, 109 Wn.2d 607, 746 P.2d 809 (1988) (recognizing the primacy of habeas corpus relief for prisoners unlawfully incarcerated).

These decisions do not show a state court system chafing under an unbearable burden of collateral attacks. Rather, the Washington courts have repeatedly chosen the principle of later constitutional intervention in sentences already set in those few cases where petitioners can meet their burdens of proof on collateral attack. Indeed, in the present case, the Washington Supreme Court had no difficulty finding sufficient "restraint" on Mr. Cook's 1958 conviction to support a collateral attack. J.A. 12-14. Given the burden of proof on petitioners, and increased state court sensitivity to Constitutional rights over the past 25 years, the number of prisoners likely to gain resentencing after collateral attack is small and probably diminishing over time. The State in its Brief thus greatly exaggerates when it claims that continuing the present system of limited habeas review of prior convictions will wreak some unspecified damage on legitimate concerns of comity and federalism.

The State also makes the surprising suggestions that if this Court holds that there is jurisdiction over habeas petitions such as Mr. Cook's then there will be no requirement that prisoners pursue any state remedy, and the State will somehow bear the burden to disprove such claims. State's Brief at 10. These assertions are incorrect under settled habeas corpus law.

The exhaustion doctrine is in effect for all federal habeas petitioners, and requires that the substance of a federal habeas petitioner's claim be presented to the highest court of the state before it is included in a federal habeas petition. *Anderson* v. *Harless*, 459 U.S. 4 (1982); *Picard* v. *Connor*, 404 U.S. 270 (1971). Mr. Cook has pursued his available state remedies (J.A. 12-14), and all other petitioners will be required to do the same.

Moreover, it is settled that federal habeas petitioners have the burden of proving a *prima facie* case on their claims. *See* e.g., *Johnson* v. *Zerbst*, 304 U.S. 458, 468-469 (1938). The State's suggestion that it will bear a previously unrecognized burden of proof on Mr. Cook's claim is thus unfounded.[14]

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[14] Notably, however, when the state did have the burden of proof, in the 1977 habitual criminal proceedings, it could not meet that burden, not because of any delay on Mr. Cook's part, but because

> . . . an investigation of the King County Prosecuting Attorney shows that no order of competency was filed, no transcript of a competency hearing exists and the entries of the clerk of the court do not show that a hearing to determine competency was made . . . or that a finding of competency was made.

J.A. 10. This suggests not that the records have been lost, but that the original record does not support the conviction.

2. Concerns Of Delay And Finality Are Not Heavily Implicated On The Jurisdictional Question Raised Here.

The State also attempts to raise related concerns regarding delay and lack of finality of judgments. State's Brief at 7-12. These assertions are not persuasive. Finality concerns, to whatever extent they may be relevant to determining the outer fringes of habeas corpus "custody", could never be sufficient to make imprisonment not equal "custody."[15] Moreover, issues of delay have nothing to do with the jurisdictional question raised here; delay issues are fully addressed by other aspects of habeas doctrine and rules which the state can invoke on remand.[16]

However, even if such assertions were strongly relevant to the "custody" question raised in this case, it is the State's choice to use the 1958 conviction to enhance the 1978 sentence that causes any problem. Mr. Cook's claim may suffer greatly due to the State's revival of the 1958 conviction to enhance the 1978 sentence. When the State uses very old convictions to lengthen new sentences, the State chooses to resurrect old constitutional defects as well. As long as the state chooses not to let the old 1958 conviction be truly final, chooses to renew it to lengthen current sentences, Mr. Cook has a legitimate present interest in the constitutional validity of that conviction. The State could refuse to enhance with older convictions;

[15] *See Lehman* v. *Lycoming County Children's Services*, *supra*, 458 U.S. at 508-514 (imprisonment under a criminal judgment is always custody; finality concerns are relevant to the fringe question whether habeas corpus "custody" exists in child custody matters).

[16] Delay is addressed in Rule 9(a) of the Rules Governing § 2254 Petitions in the United States District Courts. *See* Argument § II, below.

since it has instead chosen to use them, it must bear the consequences demanded by the Constitution.

The State's decision to use the 1958 conviction to enhance a 1978 sentence also makes it difficult for Mr. Cook to meet his burden of proving constitutional violations. This Court has cited "prejudice to meritorious claims" from lengthy delays in habeas cases where fact determinations may be crucial, including as in the present case "lack of competency to stand trial". *Peyton* v.*Rowe*, *supra*, 391 U.S. at 62. Mr. Cook is faced with proving the invalidity of a 1958 conviction which has new effects which were not triggered until 1977. He has objected since that time, but the passage of so much time harms him most because he bears the burden of proof.

The State's further asserted interest in "retrial" so that Mr. Cook can be punished if the 1958 conviction is overturned is slight, if it exists at all. *See* State's Brief at 10. If Mr. Cook proves his claim, he would not escape punishment on the 1958 conviction or on the 1978 conviction. He has served his term on the 1958 conviction and his 1978 prison term would simply be shortened by the amount of the unconstitutional enhancement from the 1958 conviction.

In examining the State's asserted interests, it is useful to examine as well the arbitrary and irrational results which the State's proposed rule would cause. For example, the sentencing court in 1958 could have sentenced Mr. Cook to 30 years instead of 20 years, as it was authorized in its discretion to do.[17] In that event, under the State's

[17] When Mr. Cook was sentenced for robbery in 1958, the trial court had discretion to sentence him to any maximum term up to life. *See Cranor* v. *Cooper*, 203 F.2d 833, 836 (9th Cir. 1953), *cert. denied*, 346 U.S. 839 (1953).

proposed rule, Mr. Cook could now challenge the 1958 conviction because the maximum 30-year term would not have expired before the habeas petition was filed. But, because the old term was actually 20 years, he could not. This proposed result is wholly arbitrary: It would preclude a challenge simple because of the length of the old term, even though that is the most irrelevant fact about the 1958 conviction as it relates to the 1978 sentence. It would permit the unlimited enhancement of a new sentence with prior, completely uncounseled convictions on which sentence had expired without a remedy, but allow challenges to identical convictions on which sentence has not expired. This would place convictions with identical enhancing effects on one side of the jurisdictional line or another based on factors extraneous to the issue of enhancement, and extraneous as well as to issues such as the constitutional or factual reliability of the old convictions.

Moreover, the State's proposed rule ignores reality and would lead to the filing of many unnecessary habeas petitions. At the time of an original conviction, the trial judge may have sentenced a prisoner to only a few months in jail or even outright probation for a year. In that case, there would be little need, and probably not enough time after exhaustion of state remedies, to pursue federal habeas corpus relief. However, when the State later uses the same old conviction to add years to a new prison term, the prisoner has a legitimate reason to litigate federal constitutional issues regarding the old conviction. The State proposes to penalize a petitioner for failing to initiate federal litigation when apparently little was at stake. The result would be not only unfairness but also many unnecessary federal habeas petitions, filed *pro se* and by counsel as preemptive measures in case the State decided later

to use an old conviction to enhance a subsequent prison term. To avoid such results, this Court should continue to allow habeas challenges to old convictions when there is a need for federal intervention, i.e., when those old convictions are causing current additional prison time.

The State proposes an irrational system which is a complete break with accepted habeas corpus doctrine granting jurisdiction when a prisoner alleges unconstitutional, actual imprisonment. The State's radical proposals for revamping habeas jurisdiction regarding unconstitutional sentence enhancements should be rejected.

II. THE STATE'S DELAY/LACHES ARGUMENT IS NOT RELEVANT TO THE JURISDICTIONAL QUESTION PRESENTED, HAS NOT BEEN DECIDED BY THE COURTS BELOW, AND IS MADE ON AN UNDEVELOPED AND INADEQUATE RECORD.

The State tries to argue, although it did not raise, an alleged "delay" issue. State's Brief at i, 10-12. This is in effect a claim of prejudice in responding to a habeas petition. *See* Rule 9(a) of the Rules Governing § 2254 Proceedings In The United States District Courts. This separate issue, which has no bearing on the "custody" question, should not be reached by this Court for the following reasons.

The "delay" issue has not been developed either factually or legally. The State raised the issue in the District Court (J.A. 15-22), but that court did not hear the facts or decide this issue because it ruled there was no "custody" and therefore no jurisdiction to consider any other issue. (Appendices B and C to the Cert. Petition). Consequently, Mr. Cook's appeal was solely on the "custody" question, so naturally the Ninth Circuit did not review the Rule 9(a) issue, either.

The District Court's understandable failure to reach the "laches" issue leaves the record seriously undeveloped and thus not ripe for decision here. For example, the State has suggested that delay in the filing of the habeas petition led to the lack of court records showing a competency hearing. J.A. 18-19. However, Mr. Cook has pointed to the prosecutor's admission in the 1977 habitual criminal proceedings (quoted above at p. 1) that there is a record but not a record of a competency hearing. J.A. 29-32. Those records which are referenced in that prosecutor's statement, including especially court clerk's notes, may still be available and should be examined by any court deciding this issue. However, these records are not in the record in this case and can be offered only upon remand. This Court should respond as it did regarding a different issue in *Hensley* v. *Municipal Court*, *supra:*

> The record on this point is more than a little obscure, and we express no opinion on the question beyond noting that the issue was not considered, much less resolved, by either of the courts below, and it is not in any sense presented for our decision.

411 U.S. at 347, n.3.[18] This Court should remand for lower

[18] Resolution of the delay issue in this case cannot adequately be made at this juncture, but it must be said that the existing record favors Mr. Cook on the Rule 9(a) issue. Mr. Cook could not reasonably have been expected to challenge the virtually dormant 1958 conviction until the State initiated habitual criminal proceedings after his conviction in 1976. As soon as the State did so, Mr. Cook did challenge the 1958 conviction, and the State soon admitted that the conviction could not be used to impose an enhanced sentence because the record did not indicate that the court's reasonable doubt about competency was ever resolved. Counterstatement of The Case, above, at p. 1. In these circumstances, the only "delay" which can fairly be attributed to Mr. Cook is the delay between his 1978 sentencing and the filing of his state post-conviction petition in the early 1980's, after the 1958 conviction was revived for enhancement. This is especially true here because of the alleged incompetence in 1958 which is supported by specific allegations of "history of confinement in mental institutions". J.A. 6. Moreover, such a delay would have to be the cause of prejudice to the state in responding to the petition. *See Strahan* v. *Blackburn*, 750 F.2d 438 (5th Cir. 1985), *cert. denied*, 471 U.S. 1138 (1985), and cases cited therein (loss of records cannot be part of the Rule 9(a) calculus when petitioner's alleged delay did not lead to loss). But this will be hard to show, because the real cause of the State's alleged proof problems may well be the failure of the original trial court record to show competency to stand trial, a failure which apparently preceded any delay attributable to Mr. Cook and may have been a defect from the beginning. Without at least an understanding of the true situation regarding the state court record and whether anything once in that record is, in fact, now gone—an understanding which is impossible to obtain on the current record before this Court—the State cannot be held to have met its burden to prove unreasonable delay by Mr. Cook causing prejudice to the State's ability to respond.

court determination of this issue, should the State choose to pursue it.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed and the case remanded for further proceedings on Mr. Cook's habeas corpus petition.

Respectfully submitted,

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No. 88-357

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1988

NORM MALENG, King County Prosecuting Attorney; AMOS E. REED, Secretary of the Washington State Department of Social & Health Services; KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

ARGUMENT

A. Respondent's 1958 conviction has not been judicially invalidated.

In his Brief, Respondent refers to his 1958 conviction as though his allegations of constitutional error were admitted facts and the conviction therefore invalid. *See*, e.g. Brief of Respondent, p. 2. In fact the contrary is true — the 1958 conviction retains its validity. If this were not so, Respondent would not have filed this petition attempting to challenge that conviction.

Respondent's suggestion that his 1958 conviction has been declared invalid is based on a statement made by the prosecuting attorney in dismissing a 1977 habitual criminal proceeding. In such a proceeding, the burden is on the prosecutor to prove beyond a reasonable doubt the existence of at least two prior felony convictions as an essential element of the habitual criminal finding. RCW 9.92.090. *State v. Holsworth*, 93 Wn.2d 148, 159 (1980). The prosecutor's statement must be read in that context. There is a substantial difference between choosing not to go forward with a supplemental information based on a prior conviction and a judicial declaration that that prior conviction is invalid.[1]

In fact, in 1984, Respondent unsuccessfully sought a judicial declaration invalidating his 1958 conviction from the Washington Appellate Courts. J.A. 4, 5, 12-14. He filed a Personal Restraint Petition pursuant to Washington Rules of Appellate Procedure (RAP) 16.3-16.15, raising the precise competency issue he seeks to raise in this § 2254 proceeding. Finding that Mr. Cook had failed to show actual prejudice–arising out of an error of constitutional magnitude, the Washington Court of Appeals dismissed his Petition. Mr. Cook's Motion for Discretionary Review in the Washington Supreme Court was also denied. J.A. 12-14.

Thus Mr. Cook's 1958 conviction is valid, and the contrary suggestion in his Brief and those of amici is unwarranted.

B. Respondent's Section 2254 Petition Clearly Involves a Challenge Only To His 1958 Conviction, and Does Not Involve a Challenge to His 1978 Sentence.

In his Brief, Respondent suggests that his § 2254 Petition can be read to be a challenge to his 1978 sentence, not to his 1958 conviction, and that the jurisdictional issue in this

[1] "[T]he attack in an habitual criminal proceeding on the use of [a prior conviction] is neither collateral nor retroactive." *Holsworth*, 93 Wn.2d at 154, *see also State v. McKenzie*, 31 Wn.App. 450, 453-54. There is also a significant difference between use of a prior conviction in an habitual criminal proceeding — where the maximum term to which the offender may be subjected is actually increased (*see* RCW 9.92.090) — and its use under Washington's sentencing system to guide the discretionary sentencing decision. *See*, part B, pp. 4-5, *infra*.

case should be viewed as "an argument on mere form [with] no substantive importance." Brief of Respondent, p. 26. However, Mr. Cook's Petition is explicitly and unequivocally an attack upon his 1958 conviction:[2]

PETITION

1. Name and location of court which entered the judgment of conviction under attack Washington State Superior Court for King County at Seattle, Washington
2. Date of judgment of conviction May 7, 1958
3. Length of sentence Three 20-year terms running concurrently
4. Nature of offenses involved (all counts) Three counts of robbery

J.A. p. 3.

The only mention of his 1978 state sentence is in Ground two of Mr. Cook's Petition. J.A. p. 6. While its possible effect on his 1978 sentence apparently is the *reason* Mr. Cook wants to challenge his 1958 conviction, there is no question that it is the 1958 conviction being challenged.[3]

Further, both the District Court and the Court of Appeals dealt with Mr. Cook's Petition as a challenge to his 1958 conviction. Petition for Cert., Appendix A, B, and C. Respondent cannot now amend his Petition so as to fashion it as a challenge to his 1978 sentence.

If the Petition were construed as a challenge to the 1978 sentence, the central issue in the case would *not* be subject matter jurisdiction — Mr. Cook is admittedly "in custody" on the 1978 conviction under *Peyton v. Rowe*, 391 U.S. 54 (1968).

Rather, the question then presented would focus on the level of due process required in setting a discretionary mini-

[2] The § 2254 petition filed in this case was prepared on a "fill in the blank" printed form supplied by the district court. The underlined words in the quotation from the petition were typewritten into the blanks by Mr. Cook. The non-underlined words were pre-printed as part of the petition form.

[3] In Ground three of his petition, Mr. Cook raised the effect of his 1958 conviction on his 1976 federal sentence. J.A. p. 7. Thus if the allegations of Ground two converts his petition into one challenging his 1978 state sentence, Ground three must be read as raising a challenge to his 1976 federal sentence, something he clearly could not do under § 2254.

mum term within the statutory maximum sentence actually imposed.

Under Washington law applicable to Mr. Cook's 1978 conviction, he was sentenced to a maximum term of life imprisonment. He has no constitutionally protected right to release prior to the expiration of that statutory maximum, except as may be created by state law. *Greenholtz v. Inmates*, 442 U.S. 1 (1979).

The actual amount of time which will be served by Mr. Cook on his 1978 state conviction cannot be determined at this time.[4] Once he is returned to state custody, the Indeterminate Sentence Review Board will establish a minimum term of confinement, using the seriousness of the crime for which he was convicted and his criminal history information — including the 1958 conviction — to identify the applicable standard range.[5] RCW 9.94A, as made applicable by RCW 9.95.009(2). *See also, Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503 (1986).

The minimum term may be set at any point within the standard range, or outside the range — up to and including the maximum — if circumstances justify so doing.[6] Other factors, including the specifics of the crime, the recommendation of the prosecutor and sentencing judge, mitigating factors — "an amalgam of elements" in the words of *Greenholtz*, 442 U.S. at 10 — may also affect the minimum term of confinement eventually established for Mr. Cook's 1978 term.[7]

[4] Mr. Cook concedes as much. *See*, generally, Brief of Respondent, pp. 4-9, p. 27 n. 13. In framing the question presented in the Petition for Certiorari, Petitioners inadvertently used the wrong tense — "may have been used" instead of "may be used" — to describe the effect of Mr. Cook's 1958 conviction on his 1978 sentence. Petition for Certiorari, p. i. Changing the verb tense does not change the question before the Court: Whether Mr. Cook will ever again be "in custody" on that 1958 conviction since the maximum term has expired.

[5] As Mr. Cook points out, statutory requirements for mandatory minimum terms may also affect the setting of the minimum, unless waived or determined by the Board to be inapplicable. Brief of Respondent, p. 4-8. See especially p. 6, n 3, n 4; p. 8, n. 6, n. 7. Even so, the minimum term will be set somewhere within the maximum term to which Mr. Cook has been sentenced.

[6] Essentially the same process applies under the Washington Sentencing Reform Act, RCW 9.94A, applicable to crimes committed after July 1, 1984. Once convicted, the offender is subject to the statutory maximum for the crime of conviction. 9.94A.120(10). Criminal history and the seriousness of the crime itself determine the standard range, but a sentence may be set outside the range under certain circumstances. RCW 9.94A.120(2), (5), and (7). The major differences between the Sentencing Reform Act and the indeterminate sentencing system applicable to Mr. Cook are two-fold: (1) The Court makes the discretionary sentencing decision under the SRA, while the Board (or its successor, *see* RCW 9.95.001(1)) will eventually establish Mr. Cook's minimum term; (2) SRA sentences are determinate — once the term has been served, the offender is discharged pursuant to RCW 9.94A.220 — Mr. Cook, on the other hand, will be released prior to the expiration of his maximum term only if found parolable. RCW 9.95.100.

[7] Cf. *Lane v. Williams*, 455 U.S. 624 (1982). In this case, decided after *Carafas v. LaVallee*, 391 U.S. 234 (1968), the Court held that the fact that a parole violation might be considered in future criminal sentencing decisions was insufficient to prevent a habeas challenge to a parole term from becoming moot once the term had expired.

It is not only impossible to tell at this time what effect the 1958 conviction will have on Mr. Cook's minimum term — it may be impossible to tell at any time in the future. Yet, the possibility that the 1958 conviction might have an impact on the length of the 1978 minimum term certainly exists, for it too will be a part of the "amalgam of elements" that could come into play when it is time to determine that minimum term. What the Respondent is attempting to do in this proceeding, very simply, is to eliminate completely that element from the amalgam. An attack on the 1978 sentence, on the other hand, would focus on the process by which the amalgam is mixed.

Thus, if in fact the 1978 sentence were the subject matter of this proceeding, the issue before the Court would be significantly different. Therefore, Respondent's characterization of the jurisdictional issue as merely "technical" is highly misleading.

C. Respondent's Allegations That He Could Have Had Another Avenue of Relief, By Way of a Different Challenge to His 1978 Sentence, Are Irrelevant to the Definition of Custody in a § 2254 proceeding.

Respondent's assertions regarding the use of constitutionally infirm prior convictions in later criminal sentencings are irrelevant to the case at bar. The narrow issue before this Court involves the definition of custody, for purposes of § 2254 subject matter jurisdiction, and whether that definition should be expanded to include the potential collateral effect of a prior conviction the sentence for which has expired.

Respondent asserts there is a line of authority that pro-

hibits the use of constitutionally infirm prior convictions to enhance[5] sentences on a later conviction. Brief of Respondent, at p. 15. In support of this proposition, Respondents cite *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1972); and, *Johnson v. Mississippi*, 108 S.Ct. 1981 (1988). However, none of these cases addresses the issue of "custody" in a federal habeas proceedings. Indeed, *none* of the cases cited by Mr. Cook were even federal habeas proceedings; instead, each was decided by this Court on direct review.

Respondent also cites *United States v. Morgan*, 346 U.S. 502 (1954). Yet, *Morgan* also was not a federal habeas proceeding and it did not define "custody". Although the sharply divided *Morgan* court allowed *coram nobis*, impiicit in the court's decision was the idea that had the court viewed the challenge as being pursuant to 28 U.S.C. § 2255,[6] the court would have lacked subject matter jursidiction. *Id.*, at 519 (Justice Minton in dissent); *see also*, *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987).

Mr. Cook's petition for federal habeas relief challenged his 1958 conviction. J.A.3. Both the district court and the Court of Appeals viewed Mr. Cook's petition as a challenge of his 1958 conviction. Assertions regarding other avenues Mr. Cook may have had to appeal his 1978 conviction are irrelevant in establishing the definition of custody for purposes of a § 2254 proceeding challenging his 1958 conviction.

D. The Washington State Courts' Treatment of Collateral Attacks on Expired Convictions Ensures Repeat Offenders Such as Mr. Cook a Remedy Even Though a Federal Habeas Court May Be Without Subject Matter Jurisdiction As To Some of Their Earlier Crimes.

Respondent correctly notes that Washington law allows an offender, such as Mr. Cook, to challenge an expired state

[5] As discussed above, Washington's use of *prior* convictions is less of an enhancement than a guide to the exercise of discretion in setting a sentence within the maximum term to which the convicted offender is subject. *supra*, p. 4-5.

[6] This section, the counterpart of § 2254 for review of a federal conviction, also has an "in custody" jurisdictional requirement.

conviction when it is used in setting a subsequent state sentence. Brief of Respondent, at p. 30. While this procedure ensures that repeat offenders such as Mr. Cook have a remedy to challenge expired sentences in state court, it does not follow that such persons are "in custody" for purposes of a federal habeas proceeding.

In *State v. Ammons*, 105 Wn.2d 175 (1986), the Washington Supreme Court held that an offender cannot challenge the constitutionality of a prior conviction at the time of sentencing unless the conviction was invalid on its face or had previously been found unconstitutional. *Id.*, 187-88. The offender may however, separately challenge the prior conviction itself by way of a personal restraint petition, pursuant to Washington Rules of Appellate Procedure (RAP) 16.3-16.15.[7] *Id.* If the offender is successful in such a challenge, then he is entitled to a new sentencing. *Id.*, at p 188.

The *Ammons* decision is predicated on use of the prior conviction and in no way affects the jurisdictional "in custody" requirement in a 28 U.S.C. § 2254 proceeding. The *Ammons* procedure ensures that even repeat offenders who, like Mr. Cook have sat on their rights, nonetheless have access to a remedy. In fact, Mr. Cook availed himself of this procedure in 1984 in exhausting his underlying claim. J.A. 4, 5, and 12-14.

Respondent was free to seek direct review, in this Court, of the final decision of the Washington Supreme Court denying his personal restraint petition. Supreme Court Rule 17.1(b)(c). Mr. Cook should not also be rewarded with a fed-

[7] Significantly, the definition of what constitutes "restraint" for purposes of the Washington procedure includes, but is broader than, the "custody" requirement of § 2254. RAP 16.4(b) provides: "A petitioner is under a 'restraint' if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under *some other disability* resulting from a judgment or sentence in a criminal case." *Id.*, Emphasis added. The "some other disability" standard closely parallels the "collateral consequence" language used by this Court in *Carafas v. LaVallee*, 391 U.S. 234 (1968), in holding that such consequences preclude a habeas challenge began while serving a sentence from becoming moot once the sentence is completed. However, mootness and jurisdiction are different concepts, and while Mr. Cook may be under a "restraint" for purposes of Washington law, he is not "in custody" for purposes of § 2254. Accord, *Cotton v. Mabey*, 674 F.2d 701 (8th Cir. 1982), *cert. denied*, 459 U.S. 1015 (1982).

eral habeas forum in which to litigate his stale claims at this late date when he had twenty (20) years within which to avail himself of a federal habeas remedy. Such an extension of the "in custody" definition would increase "Federal instrusions into state criminal [proceedings and] frustrate both the State's sovereign power to punish offenders and their good faith attempts to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 129 (1982) (Citations omitted).

CONCLUSION

For the reasons discussed above and in Petitioners' opening Brief, the judgment of the Court of Appeals for the Ninth Circuit should be reversed and the matter remanded to the District Court for dismissal for lack of subject matter jurisdiction.

DATED this 17th day of February, 1989.

Respectfully submitted,

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No. 88-357 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORM MALENG, King County Prosecuting Attorney; AMOS E. REED, Secretary of the Washington Department of Social & Health Services; and KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

—v.—

MARK EDWIN COOK,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1/]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to the preservation and defense of civil liberties. The ACLU of Washington is one of the ACLU's state affiliates.

This case presents an important question related to the availability of the writ of habeas corpus. The defense of the rights of the criminally accused and the vigorous pursuit of fairness in the criminal justice system have been major concerns of the ACLU since its inception. As a result, the ACLU has participated, either as counsel for one of the parties,

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1/ Pursuant to Rule 36.2 of this Court, amici have obtained the consent of the parties to this case prior to the filing of this brief, and their letters of consent are filed herewith.

or as amicus curiae, in numerous cases before this Court involving questions related to the fairness of the criminal justice system. The ACLU of Washington has participated both as amicus curiae and as counsel for a party in previous cases in the federal courts that presented issues affecting the rights of prisoners and the criminally accused. See e.g., Young v. State of Washington, No. 87-3990, slip op. (9th Cir. July 22, 1988); Hoptowit v. Spellman, 753 F.2d 779 (9th Cir. 1985).

INTRODUCTION AND STATEMENT OF THE CASE[2/]

The writ of habeas corpus is an important element of the American legal system. The writ's "'grand purpose . . . [is] the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.'" Peyton v. Rowe, 390 U.S. 54, 66 (1968) (quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963)). Since "the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom," Johnson v. Avery, 393 U.S. 483, 485 (1969), its availability impacts greatly upon the fair operation and administration of the criminal laws generally.

Cognizant of the necessity of the writ to ensure that governmental deprivations and restrictions of liberty occur only in appropriate circumstances and in accordance with the Constitution, Congress has authorized the federal courts to "entertain . . . application[s] for [the] writ of habeas corpus in behalf of . . .

2/ Amici adopt the Counterstatement of the Case set forth in Respondent's Brief, and briefly summarize the relevant facts herein.

person[s] in custody pursuant to the judgment of a State court." 28 U.S.C. §2254(a). The federal courts are authorized to consider habeas petitions where petitioners allege that they are "in custody in violation of the Constitution or laws or treaties of the United States." Id. Similarly, the federal courts' jurisdiction to grant writs of habeas corpus is statutorily limited to situations in which the petitioners are "in custody." See generally 28 U.S.C. §2241(c).3/

In the case now before the Court, Respondent Mark Cook filed a pro se

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3/ Section 2241 (c)(3) of Title 28 of the United States Code addresses the availability of habeas relief for state prisoners "in custody in violation of the Constitution or laws or treaties of the United States," and thus is the direct companion to 28 U.S.C. §2254. The remainder of 28 U.S.C. §2241(c) addresses the availability of the writ for persons "in custody" of other sovereigns, including the federal government. See 28 U.S.C. §§2241(c)(1) - (c)(2) and (c)(4) - (c)(5).

petition in the United States District Court requesting issuance of a writ of habeas corpus on the ground that he was subject to a lengthened term of imprisonment on account of a 1958 felony conviction which was allegedly obtained without an inquiry into his competence to stand trial, in violation of the United States Constitution.4/ The District Court dismissed the petition without reaching the merits, on the ground that Respondent Cook was not "in custody" within the meaning of the federal habeas statute, and thus held that it lacked subject matter jurisdiction.

4/ This Cou : has previously addressed the Constitutional deficiency of the imposition of criminal sanctions in the absence of an inquiry into the accused's competence to stand trial. See e.g., Pate v. Robinson, 383 U.S. 375 (1966). Respondent's petition was dismissed prior to any consideration of the merits of his underlying constitutional claim, but Respondent's Brief discusses the facts underlying the claim in greater detail.

The United States Court of Appeals for the Ninth Circuit reversed the dismissal of the petition by the District Court, and held that Respondent "is 'in custody' for the purposes of a habeas corpus attack on the 1958 conviction, and the district court erred in dismissing Cook's petition for want of subject matter jurisdiction." Cook v. Maleng, No. 86-4151, slip op. (9th Cir., June 2, 1988)(per curiam).[5/] The state of Washington filed its petition for writ of certiorari with this Court on August 27, 1988.[6/]

Amici American Civil Liberties Union and the ACLU of Washington join Respondent in urging this Court to affirm the decision

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5/ The decision below is reproduced in the Appendix to the Petition for Certiorari at A-1 - A-7.

6/ 57 U.S.L.W. 3336.

of the Ninth Circuit Court of Appeals, and to reject the narrow reading of 28 U.S.C. §2254 urged by the Petitioners in this case. The result urged by Petitioners herein would require a radical departure from the previous decisions of this Court, and amici urge the Court to reject the suggested departure from such well-established and sound legal principles.

SUMMARY OF ARGUMENT

Respondent Mark Cook seeks affirmance of the decision below which held that the district court's dismissal of his habeas petition for want of subject matter jurisdiction was erroneous as a matter of law. Amici present several arguments in support of Respondent's position.

First, the decisions of this Court clearly support the Court of Appeals'

finding that a habeas petition challenging the state's use of an allegedly unconstitutional prior conviction to determine a present or future sentence is cognizable in the federal courts. In addition, the decisions of the Courts of Appeals are consistent with the decision below, and these courts have developed useful systems for handling habeas petitions in which custody, in the form of an enhanced period of present or future incarceration, has been challenged on the ground that it is based, wholly or partially, upon an unlawful conviction.

The language of the habeas corpus statute itself supports a finding that Respondent is in custody for the purposes of federal jurisdiction over his petition. Analyzing the meaning of the habeas statute's "custody" requirement, this Court

held in Peyton v. Rowe, 391 U.S. 54 (1968) that the "custody" requirement of the federal habeas statute should be liberally construed:

> Nothing on the face of §2241 militates against an interpretation which views [the petitioners] as being "in custody" under the aggregate of consecutive sentences imposed on them. Under that interpretation, they are "in custody in violation of the Constitution" if any consecutive sentence they are scheduled to serve was imposed as the result of a deprivation of constitutional rights. This approach to the statute is consistent with the canon of construction that remedial statutes should be liberally construed.

391 U.S. at 364-65 (emphasis added).

This Court, in its rulings concerning collateral attacks; the use of unconstitutionally obtained past convictions that enhance present confinement; and competency; has already addressed each of the issues underlying this case. The Circuit Courts of Appeals

that have considered this issue directly have all held that the writ is available to challenge the enhancement of present custody by a prior conviction. This virtually unanimous body of federal case law either explicitly or implicitly acknowledges federal jurisdiction in cases like this The federal case law uniformly rejects the State's interpretation of the writ's "in custody" requirement.

The laws of the state of Washington mandate that prior convictions such as Respondent's are to be considered in sentencing for subsequent offenses. Thus, there is clearly a relationship between the prior conviction and present or future custody for Respondent and for similarly situated persons, and the constitutional validity of the prior conviction must be subject to challenge where, as here, it

could result in unlawful deprivation of liberty. In addition, state law provides that constitutional challenges to the validity of prior convictions may not be raised during sentencing, and must be addressed in post-conviction collateral attack proceedings. Thus, the availability of the federal habeas remedy is exceedingly important to Respondent.

Washington State makes the nexus between past conviction and present Sentencing Reform Act ("SRA") sentencing direct and mandatory. Washington provides that the effect of prior Class A felonies on present SRA sentencing never ends. Washington's sentencing scheme explicitly relies on collateral attacks to resolve the constitutional validity of the old conviction, and Washington's SRA elevates the importance of the constitutional

validity of the prior conviction. This Court must respect each one of Washington's choices. Each choice compels the conclusion that a petitioner challenging an old conviction meets the writ's "in custody" requirement and purposes.

Mark Cook's petition involves a fundamental right: the ability to understand the nature of the proceedings against him and to assist in his own defense. This right implicates his Sixth Amendment rights to effective assistance of counsel, to presence at the proceedings, and to confrontation. Denial of the right creates convictions so untrustworthy that factual guilt or innocence is implicated as well.

Finally, the brief of amici focuses on the implications of this court's decision for criminal defendants sentenced under the

Sentencing Reform Act ("SRA").1/ Every other state that has recently reformed its sentencing laws also relies upon prior criminal history in imposing sentences. D. Boerner, Sentencing in Washington (1985) §2.5(a) at 2-31. This brief therefore attempts to show what the consequences of this Court's decision will be on these States' legislative decisions to define the duration of the new sentence; these states' decisions about the nexus between old and new convictions; and these states' acknowledgement of a collateral forum for consideration of the validity of old convictions in current sentencing.

1/ The Sentencing Reform Act is codified at Wash. Rev. Code §§9.994A.010-9.994A.910.

ARGUMENT

I. THE COURT BELOW CORRECTLY CONCLUDED THAT THE FEDERAL COURTS HAVE JURISDICTION TO HEAR HABEAS PETITIONS CHALLENGING THE ENHANCEMENT OF PRESENT OR FUTURE CONFINEMENT AS A RESULT OF A PRIOR UNCONSTITUTIONAL CONVICTION

A. The Decisions Of This Court Clearly Establish That Habeas Petitions Alleging That A Prior Unconstitutional Conviction Has Been Or Will Be Used To Lengthen The Period Of Confinement Are Cognizable In Ihe Federal Courts

In Hensley v. Municipal Court, 411 U.S. 345 (1973) this Court observed that "[t]he custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." 411 U.S. at 351. Respondent's situation satisfies this requirement. Respondent faces the possibility of a lengthened prison sentence due to a prior conviction which he has alleged is constitutionally defective. The deprivation of liberty

through imprisonment must certainly be among the "severe restraints on individual liberty" referred to by this Court in Hensley. The prior decisions of this Court clearly establish that the deprivation of liberty which Respondent Cook is faced with satisfies the custody requirement of the federal habeas statute.

This Court has counselled that habeas relief is appropriate in "cases of special urgency," and that it should be reserved for cases where "the restraints on liberty are . . . severe." Id. at 351. In accordance with this principle, the Court has held that the custody requirement is satisfied in a variety of situations, most of them involving "less obvious

restraints"[8] than the deprivation of liberty threatened here.

In United States v. Tucker, 404 U.S. 443 (1972), this Court held that a prisoner could challenge, through a federal habeas petition, a sentencing court's use of a constitutionally invalid prior conviction to lengthen a current sentence.[9] In Tucker's case, the prior felony convictions were obtained without counsel or waiver of counsel, in violation of Gideon v. Wainwright, 372 U.S. 335 (1963). The Tucker court stated:

8/ Preiser v. Rodriguez, 411 U.S. 475, 486 n.7 (1973).

9/ This Court has also already held that a prisoner serving consecutive sentences may file a writ of habeas corpus to challenge the later sentence. Peyton v. Rowe, 391 U.S. 54. The prisoner need not wait until the later sentence starts to challenge its constitutionality. Thus, the fact that Cook challenges enhancement that has not yet commenced does not detract from his claim.

> [T]he real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had counsel, but whether the sentence in the [subsequent] 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained . . . . [T]he answer to this question must be "yes" for if the trial judge in 1953 had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding.

404 U.S. at 448 (footnotes omitted) (emphasis added). The Tucker Court held that the writ is available to challenge the use of prior, already served, but unconstitutionally obtained, convictions which are used to enhance a current sentence.

In addition, the Tucker Court held that the standard for determining whether those old convictions enhanced a current

sentence is whether the sentence in the subsequent case "might have been different if the sentencing judge had known" that the prior convictions were unconstitutionally obtained. 404 U.S. at 448 (emphasis added).10/

10/ Significantly, Respondent in the case before the Court will certainly be subjected to different sentencing standards and presumptions on the basis of his 1958 conviction.

In one respect, Cook's position has been less fully developed than Tucker's. Tucker already had the benefit of a state court decision invalidating, on constitutional grounds, two of his three prior felony convictions, and a government concession of the same point. See 431 F.2d at 1293. The validity of Tucker's third conviction "had not been determined," 404 U.S. at 448 n.6. Nevertheless, this Court remanded for resentencing without consideration of any prior, unconstitutionally obtained convictions. 404 U.S. at 449 (affirming Court of Appeals' decision to remand "without consideration of any prior convictions which are invalid . . . .," 431 F.2d at 1294). Such remand follows logically from this Court's previous holding that an unconstitutionally obtained conviction cannot be used "either to support guilt or enhance punishment for another offense . . . ." Burgett v. Texas, 389 U.S. 109, 115 (1967)(emphasis added).

While the issue of what forms of restraint upon liberty are sufficient to satisfy the custody requirement of the federal habeas statute is a question of federal law, the state law provisions setting forth the terms of confinement or other punitive or restrictive features of conviction guide the federal courts in their resolution of the question. For example, in Hensley v. Municipal Court, 411 U.S. 345, this Court held that a petitioner is "in custody," when released on his own recognizance pending the outcome of post-conviction remedies. The Court reached this conclusion by scrutinizing the restraints upon individual liberty that accompanied recognizance release in California. In California, those restraints included rearrest for failures to make required court appearances. See

also Aaron v. Pepperas, 790 F.2d 1360 (9th Cir. 1986); Owens v. Cardwell, 628 F.2d 546 (9th Cir. 1986).

Every other court that has considered this issue has also looked to the confining state's law. See e.g., Lyons v. Brierley, 435 F.2d 1214 (3d Cir. 1970)(denial of writ vacated and remanded; court looks to Pennsylvania law to determine whether successful challenge to prior, fully served state sentence would shorten confinement on current charge); United States ex rel. DiRienzo v. New Jersey, 423 F.2d 224 (3d Cir. 1970)(reversing dismissal of writ; court looks to New Jersey law); Cappetta v. Wainwright, 406 F.2d 1238 (5th Cir.), cert. denied, 396 U.S. 846 (1969)(denial of writ reversed and remanded; court looks to Florida law to decide if petitioner's later, unrelated sentence would be affected

by successful challenge to prior); United States ex rel. Durocher v. LaVallee, 330 F.2d 303 (2d Cir.), cert. denied, 377 U.S. 998 (1965)(denial of writ reversed and remanded; court looks to New York law to determine whether it was "possible" that resentencing without reliance upon prior, challenged conviction would shorten the sentence); Glover v. North Carolina, 301 F.Supp. 364, 367 (E.D.N.C. 1969)(writ available to challenge "disabilities and restraints on his liberty as a result of his having been convicted on seven felonies," even after unconditional discharge; court looks to North Carolina law to see what disabilities burdened petitioner).

This Court has thus held that federal courts have jurisdiction to entertain petitions where the sole restraint on

liberty is parole. Jones v. Cunningham, 371 U.S. 236 (1963). This Court has held that even personal recognizance release pending post-conviction relief is a sufficient restraint to make the writ an available remedy. Hensley, 411 U.S. 345. This Court has further held that restraints on petitioner's ability to engage in a business, to hold union office, to vote in state elections, or to serve as a juror are also deprivations sufficient to warrant habeas relief. Carafas v. Lavalee, 391 U.S. 234 (1968).11/

11/ Cf. Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968)(naval reservist who was denied a discharge is "in custody" for purposes of writ); Glover, 301 F.Supp. 364 (writ available where petitioner deprived of rights to hold office, serve as juror, and practice business or profession).

B. The Circuit Courts That Have Addressed This Issue Have Developed A Procedure For Reviewing The Validity Of The Prior Conviction

Several circuit courts of appeal have considered whether the writ is available to challenge the increased length of a current sentence when it is caused directly by a prior, already served, conviction and sentence. Every one of these courts has held that the writ is available. See e.g., Lyons v. Brierley, 435 F.2d 1214; United States ex rel. DiRienzo v. New Jersey, 423 F.2d 224; Cappetta v. Wainwright, 406 F.2d 1238; Harrison v. Indiana, 597 F.2d 115 (7th Cir. 1979); Williams v. Peyton, 372 F.2d 216 (4th Cir. 1967); Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966); Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965);

United States ex rel. Durocher v. LaVallee, 330 F.2d 303.[12/]

In the Ninth Circuit, the courts have explicitly developed procedures for streamlining this decision. In Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987), Campbell was convicted of aggravated murder in the first degree in Washington, and sentenced to death. Campbell's prior burglary conviction was admitted for consideration by the jury in its sentencing deliberations. Campbell challenged the constitutional validity of the prior burglary conviction. The court

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12/ The cases upon which the state relies are inapplicable. Cotton v. Mabry, 674 F.2d 701 (8th Cir.), cert. denied, 459 U.S. 1015, 103 S.Ct. 374, 74 L.Ed.2d 508 (1982), is based on a factual determination of no direct enhancement. Ward v. Knoblock, 738 F.2d 134 (6th Cir. 1984) and Harris v. Ingram, 683 F.2d 97 (4th Cir. 1982), are venue cases. They both explicitly refer the petitioner to the correct federal forum when two separate states' custody was involved.

addressed the merits of Campbell's claim (just as the district court should do in this case), holding:

> "It is . . . well-established that a sentence is subject to review if it has been enhanced in reliance on an unconstitutional conviction." United States v. Williams, 782 F.2d 1462, 1466 (9th Cir. 1986)(citing United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972)). To prevail on his claim Campbell must show that (1) the prior conviction was unconstitutional and (2) his sentence was enhanced in reliance on the prior conviction.

Campbell, 829 F.2d at 1461.

To streamline the procedure, the Campbell court first determined that there was no direct relationship between the prior burglary and the sentence of death. It therefore never reached the constitutional claim. See generally Farrow v. United States, 580 F.2d 1339, 1355 (9th Cir. 1978)(en banc)(proposing this streamlined approach). See also

Tisnado v. United States, 547 F.2d 452, 456 (9th Cir. 1976).

This procedure separates potentially meritorious petitions. This Court need not restrict jurisdiction over potentially meritorious claims such as Cook's when less restrictive procedures for disposing of nonmeritorious claims are available.[13/]

II. THE INTERESTS OF FEDERALISM WILL BE SERVED BY AFFIRMANCE OF THE DECISION BELOW BECAUSE STATE LAW GIVES EFFECT TO PRIOR CONVICTIONS SUCH AS RESPONDENT'S AND REMITS CONSTITUTIONAL CHALLENGES TO THEIR VALIDITY TO POST-CONVICTION RATHER THAN SENTENCING FORUMS

A. Washington Law Provides For Direct, Mandatory, Sentence Enhancement Due To Prior

13/ Similarly, Petitioners' concerns that affirmance of the decision below will lead to the assertion of stale claims are more appropriately addressed by other means. For example, Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts specifically provide that a habeas petition may be dismissed on the grounds of delay in certain circumstances.

Convictions, So The Nexus Between Prior Conviction and Current Confinement Is Undeniable

Common sense dictates that persons, who are incarcerated at the time of the filing of their habeas petitions and face certain future confinement are "in custody." The only logical way to explain the controversy over whether the "in custody" prerequisite is met is that the courts actually look at whether a sufficient nexus exists between the current custody and the prior, challenged conviction. A Fifth Circuit case explained this approach:

> [J]urisdiction exists if there is a positive, demonstrable relationship between the prior conviction and the petitioner's present incarceration.
>
> We agree with the appellee that the "positive relation" between prior conviction and present confinement envisioned in Cappetta is missing here. Although the Board of Pardons sent appellant a form letter

> citing his past criminal record as one reason for denying him clemency, the Board also cited appellant's original offense, his poor prison conduct, and opposition from law enforcement personnel as reasons for the denial. We believe that, under the circumstances, the relationship between the 1963 sentence and appellant's present confinement is "speculative and remote."

Sinclair v. Blackburn, 599 F.2d 673, 676 (5th Cir. 1979), cert. denied, 444 U.S. 1023 (1980)(emphasis added).

The decisions upon which the State relies, and which reject jurisdiction, either acknowledged that jurisdiction would lie in the appropriate forum (Ward v. Knoblock, 738 F.2d 134 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985) and Harris v. Ingram, 683 F.2d 97 (4th Cir. 1982)) or else found an insufficient nexus between the prior conviction and current custody (Cotton v. Mabry, 674 F.2d 701 (8th

Cir.), cert. denied, 459 U.S. 1015 (1982)). In all, whether the court had jurisdiction depended on a factual finding: whether, under the applicable state law, the prior conviction was the "but for" cause of future sentence enhancement.14/

In the Ninth Circuit, the nexus test is whether there is a "reasonable probability" that the sentence in the later case would have been different without the challenged prior conviction. Campbell v. Kincheloe, 829 F.2d 1453, 1461; Owens v. Cardwell, 628 F.2d 546, 547; Farrow v. United States, 580 F.2d 1339, 1355. See also United States v. Williams, 782 F.2d 1462, 1467.

14/ Professor Larry Yackle explains the finding this way: "'Custody' functions, on a nonconstitutional level, similarly to the 'injury in fact' requirement for adjudication in an article III court." Yackle, Explaining Habeas Corpus, 60 N.Y.U.L.Rev. 991, 1004 (1985).

In the Second Circuit, a court defined the necessary relationship between prior conviction and unrelated, subsequent, enhanced confinement as the "possibility" of lower sentencing absent the challenged prior. LaVallee, 330 F.2d at 305 n.2 ("While the sentences which Durocher received as a second offender did not exceed the maximum possible sentences for a first offender, this should in no way affect our result . . . . It is possible . . . that upon resentencing, Durocher would receive a sentence shorter than the period he has already served. This possibility is sufficient to warrant the issuance of a federal writ of habeas corpus.")(emphasis added). In the Third Circuit, the court pointed to a nexus between old and new that "directly and indubitably affects the duration of petitioner's confinement under

the second sentence." Lyons v. Brierley, 435 F.2d 1214, 1216 (emphasis added).

Cook's lengthened confinement meets any of these standards. Under Washington's new sentencing scheme, the Sentencing Reform Act ("SRA"), this conclusion is even more compelling. A criminal's prior, class A felony conviction will always directly and mandatorily affect the length of his confinement for subsequent criminal convictions. Thus, there is much more than a "possibility" that a current sentence would be lowered if the prior conviction were vacated -- under Washington state law it is, in many instances, a certainty.

As discussed fully in Respondent's Brief, Mr. Cook's sentence will be affected by the SRA even though his conviction predates the enactment of the

statute. Washington law provides that in cases such as Mr. Cook's, the enhancement effect of the prior conviction will be determined by the Indeterminate Sentencing Review Board. In re Bush, 95 Wn.2d 551, 627 P.2d 953 (1981). However, even though his sentence will be determined by the Indeterminate Sentencing Review Board, the Board is bound by state law to use the SRA standard sentencing provisions as the presumptive sentence. See Addleman v. Board of Prison Terms and Paroles, 107 Wn.2d 503, 730 P.2d 1327 (1986). Thus, the State's claim that the prior conviction's enhancement effect for Mr. Cook is collateral and attenuated is misleading. Moreover, for persons whose sentences will be governed directly and exclusively by the SRA, the state's suggestion of a tenuous relationship between prior conviction and

present or future sentence is clearly inapplicable.

The SRA sentencing court is bound to rely upon prior criminal history, including challenged prior convictions. Wash. Rev. Code §9.94A.120(1) provides that, "[e]xcept as authorized in subsections (2), (5) and (7) of this section, the court shall impose a sentence within the sentence range for the offense." (Emphasis added).15/

15/ None of the three exceptions to this rule allows a judge to exclude a prior, challenged conviction from the calculation of criminal history simply because of the challenge. Subsection (5) allows departure from the standard range for first-time offenders. This subsection will never provide a statutory basis for a previously convicted felon to ask the sentencing court to ignore a challenged prior conviction. Subsection (7) allows departure from the standard range for certain first-time sex offenders in favor of treatment. Under subsection (2), "the court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional

(continued...)

There is no statutory provision for escaping the enhancement of a current sentence by a prior, challenged conviction. There is no statutory provision for disregarding a prior conviction when computing the standard range. No Washington case has ever held that a prior, challenged conviction is a "mitigating factor" justifying a departure from the standard sentence range.

In fact, state law holds just the opposite: the court cannot choose to disregard a prior conviction, even for reasons of constitutional magnitude. State v. Falling, 50 Wn.App. 47, 53, 747

15/ (...continued)
sentence." Wash. Rev. Code §9.94A.120(2). The statutory list of illustrative, mitigating factors that meet this "substantial and compelling" test deal with the nature of the crime and the criminal's actions or state of mind. None address the validity of prior convictions.

P.2d 1119 (1987) held that "the reasons for imposing an exceptional sentence must encompass factors other than those that are inherent to the offense and are used in computing the presumptive range for the charge." (citing State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986)). Criminal history is used in computing the presumptive range for the charge. Thus, under Washington's SRA, a judge cannot disregard criminal history even if it includes a challenged conviction. In fact, under the SRA, a prosecutor cannot choose to refrain from alleging a prior criminal conviction at sentencing -- even if that conviction's constitutional validity is challenged. Wash. Rev. Code §9.94A.080(6)(plea agreements may include "any . . . promise to the defendant, except

that in no instance may the prosecutor agree not to allege prior convictions.")

In addition, a prior, Class A, felony conviction never expires under state law. Cook's challenged 1958 conviction was for three robberies.[16] See Wash. Rev. Code §9A.56.200. "[C]lass A felony convictions shall always be included in the offender score." Wash. Rev. Code §9.94A.360(2)(emphasis added). Their effect never "expires."[17]

16/ These were not ranked A, B, or C in 1958.

17/ If they are now considered Class B felonies, their effect does not expire in Cook's case either, because he never spent the requisite number of crime-free years out of prison. See Wash. Rev. Code §9.94A.360(2). Accord State of Washington Sentencing Guidelines Commission, Sentencing Guidelines Implementation Manual (June 1984) at I-7 (describing Wash. Rev. Code §9.94A.360(12)'s provisions that Class B and C felonies only "wash out" over time) and II-33 ("The commission decided that adult Class A felonies should always be considered as part of the offender score.")

A leading commentator on the effect of old convictions on SRA sentencing adopted another phrase to express the non-expiration of Class A felonies: the "decay policy." D. Boerner, Sentencing in Washington §5.6(d) at 5-10, 5-11. Class A felonies never decay. Nor can Class A felonies ever be vacated.[18]

Thus, the State errs in asserting that the old conviction has "expired." An old class A felony conviction never expires or decays, it can never be vacated and under state law it "shall" always be used in future sentencing.

The SRA relies on past criminal convictions, rather than past criminal conduct or prior arrests, to determine the defendant's offender score. Prior to the

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18/ See Wash. Rev. Code §9.94A.030(18) and Wash. Rev. Code §9.94A.230.

SRA, the sentencing court could rely on prior arrests, allegations of criminal conduct, or other information short of conviction. See In re Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988); State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977); State v. Russell, 31 Wn. App. 646, 648, 644 P.2d 704 (1982). While non-conviction information may still be considered at sentencing for some purposes, see D. Boerner, §§6.12 - 6.13, it is not the basis for the presumptive sentence.

Washington has consciously elevated the importance of actual past convictions. Now the State need not introduce any information concerning the prior conviction at sentencing -- the fact of conviction alone suffices. Since the fact of conviction is the only part of the criminal history upon which the judge may rely, the

constitutional propriety of the prior conviction becomes much more important. If the defendant's prior conviction were constitutionally invalid, use of the fact of that conviction at subsequent sentencing would result in great injustice. As this court stated in the context of sentence enhancement to the death penalty due to the fact of a prior, constitutionally invalid conviction in Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. 1981, 1986 (1988):

> The fact that petitioner served time in prison pursuant to an invalid conviction does not make the conviction itself relevant to the sentencing decision. The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct -- the document submitted to the jury proved only the facts of conviction and nothing more. That petitioner was imprisoned is not proof that he was guilty of the offense; indeed it would be perverse to treat the imposition of

punishment pursuant to an invalid conviction as an aggravating circumstance.

(Emphasis added).

B. Washington Explicitly Requires Collateral Attacks To Determine The Constitutional Validity Of Prior Convictions Used For Enhancement

The Washington Supreme Court has instructed habeas litigants that they cannot raise constitutional challenges to the validity of prior sentences in SRA sentencing proceedings, and directs them to attack the constitutional validity of any prior conviction in post-conviction collateral proceedings. The Washington Supreme Court held in State v. Ammons that

> [t]he defendant has no right to contest a prior conviction at a subsequent sentencing . . . . The defendant has available, more appropriate arenas for the determination of the constitutional validity of a prior conviction. The defendant must use established avenues of challenge provided for post-conviction relief. A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719, 718 P.2d 796, cert. denied, ___ U.S. ___, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). Thus, Cook, by filing this writ, took the only path that the Washington Supreme Court left open to him.19/

Thus, Washington law not only makes the consequences of a prior felony upon current sentencing direct and mandatory; it also directs the defendant to the collateral forum. It is manifestly unfair for the State to assert in this case that the State's own provisions for determining

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19/ The Washington Supreme Court reiterated the rule that collateral attack is the only forum available to those in Cook's position in State v. Jones, 110 Wn.2d 74, 79, 750 P.2d 620 (1988)(en banc). See also In re Williams, 111 Wn.2d 353, 367-68, 759 P.2d 436.

claims such as Cook's interferes with the State's sentencing scheme.

The SRA makes the effect of prior convictions mandatory. It specifically makes new sentences depend upon old crimes. Neither proportionality, accountability, nor any other legitimate State goal, however, is served by reliance upon "misinformation of constitutional magnitude,"[20] or "materially untrue" information in sentencing.[21] Washington itself acknowledges this principle.

As this Court observed in Burgett v. Texas, 389 U.S. 109 (1967), "[t]he States are free to provide such procedures as they

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20/ United States v. Tucker, 404 U.S. at 447 (referring to later use of prior conviction obtained absent counsel or waiver).

21/ Townsend v. Burke, 334 U.S. 736, 741 (1948)(describing record of prior, uncounseled conviction). Accord In re Bush, 26 Wn.App. 486, 497, 616 P.2d 666 (1980), aff'd, 95 Wn.2d 551, 627 P.2d 99 (1981).

choose . . . provided that none of them infringes a guarantee in the Federal Constitution." 389 U.S. at 113-14. If Respondent is deprived of the opportunity for federal habeas review, the Court would effectively allow Washington, and other jurisdictions a freedom heretofore unrecognized: the freedom to structure a criminal justice system immune, in an important respect, from constitutional challenge and irreverent of the legitimate concerns served by federal habeas review of state criminal convictions.

III. WHETHER COOK'S PETITION IS DEEMED A CHALLENGE TO A PAST CONVICTION OR A CHALLENGE TO FUTURE CONFINEMENT, THE RESULT IS THE SAME

It is undisputed that the writ is available to challenge future confinement. Peyton v. Rowe, 391 U.S. 54, 20 L.Ed.2d 426, 88 S.Ct. 1549 (1968). See generally,

Annot. 36 L.Ed.2d 1012, 1021-22 (1974). The writ is also available to challenge the legal restraints of past convictions. E.g., Jones v. Cunningham, 371 U.S. 236.[22/]

No matter how the court chooses to categorize the challenge, the result should be the same:

22/ As one commentator recently explained:

> It occasionally happens that a previous conviction, the sentence for which has been served, nonetheless continues to influence a litigant's current status . . . . In circumstances of that kind, the validity of the prior conviction can be challenged in a habeas attack upon the new conviction or sentence -- based on the theory that use of an invalid prior judgment constitutes new and independent federal error. The result, of course, is a belated attack on the prior conviction itself. In some instances, courts have permitted petitioners to challenge previous convictions straight forwardly in these circumstances, apparently on the theory that their effect upon applicants' current detention constitutes "custody" for habeas purposes.

Yackle, Explaining Habeas Corpus, 60 N.Y.U.L.Rev. at 1009-10 n.31 (emphasis added).

> [I]t is now plain that [prisoners] are sufficiently in the "custody" of consecutive sentences to invoke the writ to attack future terms not yet begun. Looking the other way, prisoners who complain that the sentences they are now serving were enhanced by prior convictions may attack those earlier judgments in the course of a challenge to their present terms.

Yackle, Postconviction Remedies, §43 at 186 (1981).[23/]

In Cook's case there is no venue problem; if anything, there is a labelling problem (i.e., Respondent's petition may have been, at worst, mislabelled as an

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23/ Characterizing this as a "past" or "future" challenge would be important only if the 1958 and 1976 convictions occurred in different states; then, questions about the correct forum in which to file or to exhaust might arise. See e.g., St. John v. Sargent, 569 F.Supp. 696 (N.D.Cal. 1983)(§2254 challenge to California conviction used to enhance Arkansas sentence; court holds custody requirement would be met in Arkansas, not California). See generally Yackle, id. §68 at 286-96. Cook's convictions both occurred in the State of Washington, so no problem with different forums is presented here.

attack on the old charge instead of an attack on the present custody imposed by the State's detainer). This Court should not punish Mr. Cook, as the State seeks to do, if it determines that he failed to label his petition with the correct words. Haines v. Kerner, 404 U.S. 519 (1972). Cook filed his petition pro se, and the rule of liberal construction applies. This is particularly true for habeas actions, where this Court has "consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." Hensley v. Municipal Court, 411 U.S. at 350; accord Peyton v. Rowe, 390 U.S. at 66 ("'[the writ] is not now and never has been a static, narrow, formalistic

remedy.'")(citation omitted). Finally, as this Court stated, in granting relief to a prisoner who challenged the enhancement of his New York State sentence because of his prior, 1939, federal conviction, obtained without counsel or waiver: "In behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief." United States v. Morgan, 346 U.S. 502, 505 (1953).

The substantive issue is essentially settled; only the procedural one (the proper forum in which to file) or the formal one (whether to call it a retrospective or a prospective attack) remain in question at all, and neither issue needs to be resolved to decide Cook's case.

IV. THE UNDERLYING CONSTITUTIONAL CLAIM IN RESPONDENT'S CASE IS WELL-ESTABLISHED, AND HE IS CERTAINLY ENTITLED TO CHALLENGE THE VALIDITY OF HIS PRIOR CONVICTION IN A FEDERAL FORUM ON THIS GROUND

This case raises fundamental constitutional issues. Cook's claim encompasses both the procedural due process issue that he identified in his habeas petition and Sixth Amendment issues. The test of competency to stand trial under federal law is "whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding of the proceedings against him." Annot. 4 L.Ed.2d 2077, 2083 (1964)(emphasis added). The test is the same under Washington law. "'Incompetency' means a person lacks the capacity to understand the nature of the proceedings against him or to assist in his own defense as a result of mental disease or defect."

Wash. Rev. Code §10.77.010(6)(emphasis added).

It is undisputed that competency is a basic underpinning of a defendant's fundamental due process right to a fair trial. Drope v. Missouri, 420 U.S. 162, 172 (1975). Competency also implicates the rights to be mentally present, to confront one's accusers, and to consult with counsel and thereby assist in one's own defense both prior to and during trial. State v. Maryott, 6 Wn.App. 96, 492 P.2d 239 (1971).[24/]

The Sixth Amendment aspect of this claim brings it under the rubric of the core, Burgett-Tucker line of cases precluding the use of convictions obtained

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24/ See also State v. Murphy, 56 Wn.2d 761, 355 P.2d 323 (1960)(right to mental presence denied by giving defendant tranquilizers).

in violation of this fundamental right for any purpose. Therefore, the underlying constitutional claim in Cook's case is well-established in federal constitutional law.

Further, because competency involves defendant's full use of mental faculties, these claims are difficult for a petitioner to enunciate while still lacking full use of those faculties. The age of these claims does not, therefore, typically bar them. This is true even though competency claims typically raise questions that are difficult to answer even a few years later.25/

25/ See Dusky v. United States, 362 U.S. 402 (1966)(recognizing "the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioners competency as of more than a year ago, but reviewing the claim anyway). Accord Pate v. Robinson, 383 U.S. at 387 ("[W]e have previously (continued...)

Cook's claim is thus a fundamental one. It is one that implicates procedural due process and Sixth Amendment rights. Because it implicates the right to assist counsel in providing effective representation, it is a claim which, if proven, would invalidate any enhanced sentencing based upon the prior conviction because that sentencing would rest upon "misinformation of constitutional magnitude," as in Tucker. Cook's claim thus raises no novel problems for the Court. It rests squarely upon well-established rights and involves long-accepted principles.

25/ (...continued)
emphasized the difficulty of retrospectively determining an accused's competence to stand trial.")

CONCLUSION

For the reasons set forth herein, amici urge this Court to affirm the decision below.

Respectfully submitted,

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Dated: January 31, 1989

No. 88-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORM MALENG, King County Prosecuting Attorney; AMOS E. REED, Secretary of the Washington State Department of Social & Health Services; KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a private, non-profit organization located in

Washington, D.C., whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. NLADA has a membership of 2,300 legal aid and defender offices employing approximately 25,000 professionals and, in addition, over 1,000 individual members. The membership of NLADA includes most public defender offices and legal service agencies in the nation, as well as assigned counsel plans and individual practitioners.

Accordingly, NLADA is vitally interested in ensuring that indigent habeas corpus petitioners will continue to have access to the federal courts to challenge unconstitutionally obtained convictions, including convictions used to enhance later sentences. Counsel for

each of the parties to this case has consented in writing to the filing of an amicus curiae brief on behalf of the NLADA.

STATEMENT

Petitioner, Mark Edwin Cook, was convicted of armed robbery in 1958. In 1976, Mr. Cook was convicted of Washington state crimes. In imposing sentence in 1978, the Washington trial court lengthened Mr. Cook's minimum sentence by two and one-half years because of his prior convictions.

In his petition for habeas corpus, Mr. Cook alleged that his 1985 conviction was invalid because he never received a competency hearing which had been ordered by the trial court. He claims that a determination that his 1958 conviction was unconstitutional would result in a

reduction of his 1978 sentence.

The district court found no jurisdiction to consider the challenge to the 1958 conviction. The United States Court of Appeals for the Ninth Circuit reversed. This Court granted certiorari to address whether a district court has subject matter jurisdiction over a § 2254 challenge to a prior fully-served conviction used to enhance a subsequent unrelated state sentence.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has consistently held that federal district courts have habeas corpus jurisdiction to review a prisoner's constitutional challenge to a fully served conviction which lengthened the sentence currently being served. See United States v. Tucker, 404 U.S. 443, 448 (1972); United States v. Morgan, 346

U.S. 502, 512 (1954). Mr. Cook's petition presents a compelling case for habeas corpus relief because the minimum duration of his 1978 Washington sentence was increased by several years as a result of his 1958 conviction. Cook v. Maleng, 847 F.2d 616, 617 (9th Cir.), cert. granted, 109 S. Ct. 363 (1988). The increase in the minimum term on the 1978 sentence requires that the federal court review his challenge to the 1958 conviction.

The instant petition falls squarely within the traditional scope of habeas corpus jurisdiction. The federal habeas corpus statute requires that the applicant must be "in custody" when the application for habeas corpus is filed. 28 U.S.C. § 2241(c), 28 U.S.C. § 2254. The custody requirement of the statute is

designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Hensley v. Municipal Court, 411 U.S. 345, 352 (1973). In the present case, the additional time Mr. Cook will spend in prison as a result of the 1958 conviction is a severe restraint on his individual liberty.

Both the language of the statute and the common law history of the writ reveal that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody. Preiser v. Rodriguez, 411 U.S. 475, 485 (1973).

In the present case, this Court need not expand the limits of the "in custody"

requirement. See Hensley v. Municipal Court, 411 U.S. 345 (1973) (custody found for petitioners released on bail); Carafas v. LaValee, 391 U.S. 234 (1968) (custody found for petitioners released during habeas review); Jones v. Cunningham, 371 U.S. 236 (1963) (custody found for petitioners serving a term of parole). Mr. Cook's petition presents a clear-cut case of custody resulting from an earlier sentence which, if invalid, prolongs illegally his stay in prison. See United States v. Tucker, 404 U.S. 443, 448 (1972). See also Burgett v. Texas, 389 U.S. 109, 115 (1967).

Because the use of a prior, unconstitutional sentence to enhance a subsequent sentence revives the earlier violation of the accused's constitutional rights, the federal courts should retain

habeas corpus jurisdiction to review such enhanced sentences.

ARGUMENT

I. THE NINTH CIRCUIT CORRECTLY REVERSED THE TRIAL COURT'S DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE PETITIONER WAS IN CUSTODY WHEN HE FILED HIS PETITION FOR HABEAS CORPUS.

The minimum duration of Mr. Cook's 1978 Washington sentence was increased by several years because of his 1958 conviction. As a result, the federal district court has jurisdiction over his challenge to the constitutionality of his 1958 conviction. If the prior conviction was obtained unconstitutionally, then the sentence imposed for the 1978 conviction was improperly long, an error clearly appropriate for habeas corpus relief. See United States v. Tucker, 404 U.S. 443, 448 (1972); see also Burgett v. Texas, 389 U.S. 109, 115 (1967). As the

United States Court of Appeals for the Ninth Circuit recognized in this case, habeas corpus jurisdiction extends to only a limited class of fully served prior convictions:

> [w]e do not hold that jurisdiction afforded by section 2254(a) extends to all constitutional challenges to prior convictions upon a showing of some unfavorable collateral consequence flowing from the challenged conviction. The question presented for our decision is a narrow one, namely, whether the custody requirement for habeas corpus relief is satisfied where a prisoner's prior conviction, although expired, is used to enhance the sentence on a current or future term. We conclude the custody requirement is satisfied in such a case. Where the state uses a prior conviction to enhance a present or future sentence, fairness requires that such restraints on individual liberty be justified.

Cook v. Maleng, 847 F.2d 616, 619 (9th Cir. 1988), citing Hensley v. Municipal Court, 411 U.S. 345, 350-351 (1973). Amicus curiae asserts that habeas corpus petitioners are entitled to relief when a

fully-served sentence resulting from an unconstitutionally obtained conviction causes a separate conviction or sentence to be enhanced. Recognizing this right serves the core purpose of habeas corpus: preventing illegal detention of an individual.

In Peyton v. Rowe, 391 U.S. 54 (1968), this Court held that a prisoner may attack on habeas corpus the second of two consecutive sentences while still serving the first. The Peyton Court indicated that the federal habeas corpus statute "does not deny the federal courts power to fashion appropriate relief other than immediate release." Id. 391 U.S. at 66. Such relief is required not only when a prisoner seeks immediate discharge from confinement but also when he seeks to diminish the length of that sentence.

See Preiser v. Rodriguez, 411 U.S. 475, 483 (1973) (habeas corpus and not § 1983 is the sole federal remedy to challenge duration of imprisonment when relief sought is speedier release).

II. THIS COURT SHOULD CONTINUE TO LIMIT THE COLLATERAL USE OF INVALID PRIOR CONVICTIONS TO ENHANCE PUNISHMENT FOR A SUBSEQUENT OFFENSE.

This Court has held consistently that an invalid prior conviction may not be used to enhance a subsequent conviction. There is no persuasive reason to abandon this rule. In Burgett v. Texas, 389 U.S. 109 (1967), this Court held that a prior felony conviction, invalid because of a violation of the right to counsel as enunciated in Gideon v. Wainwright, 372 U.S. 335 (1963), could not be used to support guilt under an enhancement statute. The Burgett Court concluded that the use of an unconstitutional prior

conviction "either to support guilt or enhance punishment" revives the violation of the accused's constitutional rights. Burgett, 369 U.S. at 115. See also Lewis v. United States, 445 U.S. 55, 60 (1980).

In United States v. Tucker, 404 U.S. 443 (1972), this Court held that uncounseled prior convictions could not be used as factors in sentencing for a subsequent offense. In Tucker, the habeas corpus petitioner was sentenced in federal court on the basis of two fully served convictions regarding which he had been denied the right to counsel. This Court stated that a sentence must not be based on "misinformation of a constitutional magnitude." Tucker, 404 U.S. at 448. Accord Jones v. Cunningham, 371 U.S. 236, 243 (1963). See also Townsend v. Burke, 334 U.S. 736 (1948)

(prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue). Like the sentence in Tucker, Mr. Cook's current sentence was in fact enhanced by a prior, fully-served conviction.

The requirement of both Burgett and Tucker is that a habeas corpus petitioner, in custody as a result of an enhanced sentence, must not have his or her sentences determined on the basis of prior unconstitutionally obtained conviction. Because the use of a prior unconstitutional sentence to enhance a subsequent sentence revives the earlier violation of the accused's constitutional rights, the federal courts should retain habeas corpus jurisdiction to review such enhanced sentences. See Burgett v. Texas, 389 U.S. 109, 115 (1967).

In a case nearly identical to the case at bar, this Court granted a writ of error coram nobis to a petitioner sentenced as a recidivist on the basis of a fifteen-year-old fully served conviction. United States v. Morgan, 346 U.S. 502 (1954). The Court stated:

> Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid.

Morgan, 346 U.S. at 512-13.

In Morgan, the district court had jurisdiction because the prior sentence enhanced the later conviction. Id. at 503-04. The case at bar presents a similar case for jurisdiction.

III. THIS COURT SHOULD FOLLOW THE HOLDINGS OF THE VAST MAJORITY OF CIRCUITS WHICH ALLOW HABEAS CORPUS JURISDICTION TO CHALLENGE A PRIOR FULLY SERVED SENTENCE USED TO ENHANCE A LATER CONVICTION.

The vast majority of appellate courts which have considered the enhancement issue have held that there is habeas corpus jurisdiction for prisoners to attack a prior fully-served conviction used to increase the severity of charges or sentences. Aziz v. Leferve, 830 F.2d 184 (11th Cir. 1987); Young v. Lynaugh, 821 F.2d 1133 (5th Cir.), cert. denied, 108 S. Ct. 503 (1987); Anderson v. Smith, 751 F.2d 96 (2nd Cir. 1984); Thacker v. Peyton, 419 F.2d 1377 (4th Cir. 1969). See also Harrison v. Indiana, 597 F.2d 115 (7th Cir. 1979); Lyons v. Brierly, 435 F.2d 1214 (3d Cir. 1970).

In a decision involving the same issue as the instant case, the Fifth Circuit held that a petitioner is "in custody" to attack a prior fully-served offense used to enhance a later sentence. In Young v. Lynaugh, 821 F.2d 1133 (5th Cir. 1987), the petitioner challenged a 1963 conviction allegedly involving an improper and uncounseled guilty plea which resulted in his receiving a life sentence in 1978 as a habitual offender. The Court of Appeals stated that "in custody" for jurisdiction does not necessarily mean "in custody for the offense being attacked." Young, 821 F.2d at 1137. The Young court held that a federal district court has jurisdiction when there is "a positive and demonstrable nexus between a petitioner's current custody and the allegedly

unconstitutional conviction." Id. See Craig v. Beto, 458 F.2d 1131, 1134 (5th Cir. 1972) (petitioner in custody if serving enhanced sentence at time of filing petition); Jackson v. Louisiana, 452 F.2d 451, 452 (5th Cir. 1971) (same); Cappetta v. Wainwright, 406 F.2d 1238, 1239 (5th Cir.), cert. denied, 396 U.S. 846 (1969) (petitioner in custody if prior conviction delayed start of a later conviction).

In Anderson v. Smith, 751 F.2d 96 (2d Cir. 1984), the Court of Appeals found jurisdiction for a challenge to a fully-served sentence for possession of weapons, alleged to have been based on a Fifth Amendment violation, which could have lengthened a contemporaneous felony murder sentence. The habeas corpus petition was filed more than four years

after the completion of the sentence for illegal possession of weapons. Anderson, 751 F.2d at 100. See also United States ex rel. Durocher v. LaVallee, 330 F.2d 303, 306 (2d Cir.) (en banc), cert. denied, 377 U.S. 998 (1964) (petitioner confined as recidivist, whose sentence might be reduced if successful in attacking fully-served convictions is in custody); Easterling v. Wilkins, 303 F.2d 883, 884 (2nd Cir. 1962) (same).

In Harrison v. Indiana, 597 F.2d 115 (7th Cir. 1979), the Seventh Circuit held that a prisoner confined pursuant to one conviction may attack the validity of a separate, prior conviction if it prolongs the period of his confinement. In Harrison, an invalid 1966 conviction postponed the beginning of petitioner's 1971 sentence. 597 F.2d at 116. The

Harrison court stated that the invalid sentence would unlawfully prolong the restraint on petitioner's liberty, so that he was effectively "in custody" on the earlier conviction. Id. at 116-17. Thus, Harrison was found to be "in custody" for purposes of federal habeas corpus jurisdiction. Id. at 117. Accord Lyons v. Brierly, 435 F.2d 1214, 1215-16 (3d Cir. 1970) (petitioner in custody to challenge validity of fully-served sentence which petitioner had been required to complete and which thereby postponed commencement of a later sentence).

In the present case, Mr. Cook does not seek any expansion of the meaning of the "in custody" jurisdictional requirement of 28 U.S.C. § 2254 for habeas corpus relief. As the Third Circuit indicated

in finding jurisdiction in a similar case:

> we do not deal with the outer limits which the "in custody" requirement places on jurisdiction to entertain writs of habeas corpus. Here the earlier sentence which is under attack directly and indubitably affects the duration of petitioner's confinement under the second sentences. This is a clear cut case of custody resulting from an earlier sentence which if invalid prolongs illegally petitioner's stay in prison.

Lyons, 435 F.2d at 1215-16. Accord United States ex rel. Di Rienzo v. New Jersey, 423 F.2d 224 (3d Cir. 1970).

The cases cited by the State of Washington in support of a contrary rule are not persuasive. The court in Cotton v. Mabry, 674 F.2d 701 (8th Cir. 1982), cert. denied, 459 U.S. 1015 (1982), ruled that a petitioner was not in custody to challenge a prior conviction even if that conviction prolonged two present sentences. The Cotton court erroneously

relied on Harvey v. South Dakota, 526 F.2d 840, 841 (8th Cir. 1975), cert. denied, 426 U.S. 911 (1976), for the proposition that "[t]he collateral consequences of conviction only kept the case from becoming moot; they did not suffice to give the federal courts jurisdiction." Cotton, 674 F.2d at 703. In fact, the petitioner in Harvey merely challenged a fully served sentence, not one used to enhance a later sentence. 526 F.2d at 841. Thus the Harvey petitioner was not in custody and this Court's decision in Carafas v. LaValee, 391 U.S. 234 (1968), was fully dispositive of the issue. Carafas held that a prisoner is in custody if the petition was filed before his or her release from prison or parole. 391 U.S. at 237-38. Because the petitioner in

Harvey was no longer in custody when he filed his habeas corpus petition, the district court lacked jurisdiction over the petition.

Unlike the situation in Harvey, the restraints on liberty in a case involving enhancement are both severe and immediate because the duration of present custody continues to be determined by the prior conviction. See Hensley v. Municipal Court, 411 U.S. 345, 352 (1973).

The state cites Harris v. Ingram, 683 F.2d 97 (4th Cir. 1982), as support for its proposition that custody is not reestablished by the use of a fully-served conviction to enhance a later sentence. Harris, however, is concerned with venue and not jurisdiction. The Harris court held that a federal district court in one state may not consider a

habeas petition challenging a prior fully-served state conviction in that state when the petitioner is imprisoned in another state on an unrelated charge. 683 F.2d at 98. Both the decisions on which Harris relied concerned the proper venue to challenge a fully-served out-of-state conviction used to enhance another state's sentence. See Hanson v. Circuit Court, 591 F.2d 404 (7th Cir.), cert. denied 444 U.S. 907 (1979); Noll v. Nebraska, 537 F.2d 967 (8th Cir. 1976). Furthermore, the Fourth Circuit has held consistently that a prisoner is in custody for purposes of habeas corpus jurisdiction to attack a fully served sentence used to enhance a subsequent conviction. See Thacker v. Peyton, 419 F.2d 1377 (4th Cir. 1969); Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968);

Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966). See also Thacker v. Garrison, 527 F.2d 1006 (4th Cir. 1975).

Finally, the State relies on Ward v. Knoblock, 738 F.2d 134 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985), which is not an enhancement case at all but concerns collateral consequences in the parole setting.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit, holding that the custody requirement for habeas corpus jurisdiction was satisfied when a petitioner's prior conviction, although expired, was used to enhance his current sentence, should be affirmed.

Respectfully submitted,

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